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No. 247

Supreme Court of the United States

OCTOBER TERM, 1956

THE BRITISH TRANSPORT COMMISSION,
Petitioner,

v.

UNITED STATES OF AMERICA, as owner of the U.S.N.S. HAITI VICTORY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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City of Boston, 182 Fed. 171 (D. Mass. 1909)	15
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Dagmar Salen, The, v. *Puget Sound Navigation Co.*, [1951] S. C. R. 608, 613, 1951 A. M. C. 1253, 1258	34
Department of Highways v. *Jahncke Service*, 174 F.2d 894 (5th Cir. 1949)	8, 14, 15
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Hartford Accident Indemnity Co. v. *Southern Pacific Co.*, 273 U.S. 207	10
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Irving, The, 33 F.Supp. 59 (S.D.N.Y. 1940)	20
Johan Poulsen, The, 1925 A.M.C. 178 (D.Ore. 1924)	14
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Lie v. *San Francisco & Portland S.S. Co.*, 243 U.S. 291	42
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Main, The, v. *Williams*, 152 U.S. 122	9
Medford, The, 65 F. Supp. 622 (E.D.N.Y. 1946)	30, 31
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Moore-McCormack Lines, Inc. v. *McMahon*, decided June 26, 1956 (2d Cir.)	15, 16
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New York and Porto Rico Steamship Co., Petitioner, 155 U.S. 523	11
Pennsylvania, The, 19 Wall. 125	40, 45
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Silver Palm, The, 94 F.2d 754 (9th Cir. 1938)	42, 44, 45
Steel Inventor, The, 1925 A.M.C. 226 (E.D.N.Y.), 24 F.2d 657, 43 F.2d 958 (2d Cir.)	16, 19
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Texas Co., Petition of, 81 F.Supp. 758 (S.D.N.Y. 1948)	8, 14
Themistocles, The, 4 Lloyd's L. Rep. 107 (C.A. 1919)	36
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Germany—German Commercial Code (HGB) sec. 486; Wüstendörfer, Neuzeitliches Seehandelsrecht (1950 ed.); Gierke, Handelsrecht und Schiffahrtsrecht (1955 ed.) Sec. 81	23
Great Britain—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) Sec. 503	18–19, 22
Great Britain—Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57) Sec. 8	18
Great Britain—Rule LV (H) of the Rules of the Supreme Court [The Annual Practice 1956 (London, 1956)]	22

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Holland—Comm. Code, Art. 541; Woltman, De Bepertke Aansprakelijkheid van den Reeder (Leiden, 1936)	23
Italy—Cod. di Comm., Arts, 491 *et seq.*; Cod. di Navig. (1941) Arts. 275-277, 620 *et seq.*; d'Ovidio-Pescatore, Manuale di diritto della navigazione (1950)	23
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Benedict on Admiralty (3d ed. 1894)	12
Benedict on Admiralty (6th ed. 1940)	10, 13, 15
Griffin, *American Law of Collision* (1949)	29
Marsden, *Collisions at Sea* (10th ed.)	9
Penrose and Boulding, *Principles and Practice of Radar* (5th ed. 1955)	37
Prosser, *Torts* (2d ed. 1955)	34
Restatement, Torts, § 298	34
Sonnenberg, *Radar and Electronic Navigation* (2d ed. 1955)	37
Wylie, *The Use of Radar at Sea* (1953)	37, 39
Miscellaneous:	
Federal Communications Commission, Annual Report for 1955	30
James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 13 (1951)	35
Journal of the Institute of Navigation, April, 1955, "The Cause of Collisions at Sea with Radar"	39
Kerrins, "Effect of Radar on Collision Law," *Proceedings of American Merchant Marine Conference* (1948)	30
Liverpool Underwriters Association 153d Annual Report, 1954	30
Lloyd's List and Shipping Gazette, July 14, 1953, Collision Claims—Difference Between British and U.S. Law	19
Madacey, "Are We Getting the Most from What We Have," Radio Technical Commission for Marine Services, Symposium Papers Delivered at Spring Assembly Meeting, Washington, D.C., April 20-22, 1953	32
Phillips, "Five Years Progress in the Application of Radar to Marine Navigation", Radio Technical Commission for Marine Services, Symposium Papers Delivered At Spring Assembly Meeting, Baltimore, Md., April 19-20, 1951	29
Proceedings of Merchant Marine Council, Vol. 18, 1950-52	39
Sailing Directions for the East Coast of England (U.S. Navy H. O. Pub. No. 150, 5th ed. 1951)	26
Seavey, *Negligence, Subjective or Objective*, 41 Harv. L. Rev. 1 (1927)	34
U.S.C.G. Pub. C.G. 157, 1949, *Ocean Electronic Navigational Aids*	29
Wiley, "Radar and the Rules of the Road at Sea," *Journal of the Institute of Navigation*, January, 1950	29
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THE BRITISH TRANSPORT COMMISSION,
Petitioner,

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UNITED STATES OF AMERICA, as owner of the U.S.N.S. HAITI VICTORY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The British Transport Commission, a corporation established in Great Britain, prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Fourth Circuit entered on February 13, 1956 (Appendix, p. 23). The decree affirmed in part and reversed in part a final decree in admiralty of the United States District Court for the Eastern District of Virginia (Appendix, p. 10), and remanded the case for further proceedings.

The action is one in admiralty, originated by petition of the United States, as owner of the U.S.N.S. HAITI VICTORY, seeking exoneration from or limitation of liability arising out of a collision in 1953 in the North Sea between the HAITI VICTORY and the S.S. DUKE OF YORK, owned and operated by petitioner.

OPINIONS BELOW

The District Court's memorandum opinion and order holding that petitioner could not be impleaded by other claimants under Admiralty Rule 56 (Appendix, p. 1) is not reported. The same court's memorandum opinion exonerating the United States, as owner of the HAITI VICTORY, from liability, adopted by the court as its findings of fact and conclusions of law (Appendix, p. 10), is reported at 131 F. Supp. 712. The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix, p. 12) is reported at 230 F. 2d 139.

JURISDICTION

The decree of the United States Court of Appeals for the Fourth Circuit was entered on February 13, 1956 (Appendix, p. 23). On April 10, 1956, the time for filing a petition for writ of certiorari was extended to and including July 12, 1956 by an order signed by the Chief Justice. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The United States, as owner of a vessel which rammed the British Transport Commission vessel DUKE OF YORK in the North Sea, brought limitation of liability proceedings in the District Court. In accordance with Admiralty Rule 51, all persons having claims against the United States arising out of the collision were admonished to file them in this proceeding. Accordingly, the British Transport Commission, whose vessel was badly damaged by the HAITI VICTORY, filed its claim. The first question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of

Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision.

2. The HAITI VICTORY when she rammed the DUKE OF YORK was equipped with radar in good working order. She was navigating on a dark night in a heavily traveled coastal area and in the vicinity of a fog bank by which the DUKE OF YORK was hidden. Yet she did not utilize her radar, which, if used, would have disclosed the presence of the approaching DUKE OF YORK and of the fog which hid her from sight. The second question presented is whether under these circumstances the HAITI VICTORY is entitled to exoneration from liability for the collision.

3. For approximately a full minute after hearing the fog signal of the DUKE OF YORK forward of her beam, the HAITI VICTORY failed to stop her engines, in violation of the mandatory requirements of Article 16 of the Regulations for Preventing Collisions at Sea. There is no finding or evidence that, had the engines been stopped at once, the collision could not have been avoided. Indeed, the reasonable probability is that, if the HAITI VICTORY had not so violated the statute, she would not have rammed the DUKE. The third question presented is whether under these circumstances the HAITI VICTORY is entitled to exoneration from liability in spite of her admitted statutory violation.

STATUTES AND RULES INVOLVED

General Admiralty Rule 56 provides (254 U. S., app. p. 29, 28 U. S. C., 1952 ed., p. 4401):

> "RULE 56. RIGHT TO BRING IN PARTY JOINTLY LIABLE.
>
> "In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall

be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

Articles 16 and 29 of the Regulations for Preventing Collisions at Sea in effect at the time of the collision here involved (26 Stat. 320, 326, 328, 33 U.S.C., 1946 ed., §§ 92, 121), are as follows:[1]

"SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH.

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"NO VESSEL, UNDER ANY CIRCUMSTANCES, TO NEGLECT PROPER PRECAUTIONS.

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

STATEMENT

Shortly before dawn on May 6, 1953, where the English Channel opens into the North Sea, the Naval Transport HAITI VICTORY, owned by the United States,

[1] Effective January 1, 1954, these regulations were replaced by Rules 16 and 29, 65 Stat. 417, 419, 33 U.S.C. §§ 145n, 147a. No material change was effected in these Articles by this revision.

rammed the overnight channel ferry DUKE OF YORK, owned by petitioner. The bow of the HAITI VICTORY knifed so deeply into the port side of the DUKE OF YORK just forward of her bridge that the entire bow of that vessel broke away and sank. Several passengers on the DUKE OF YORK were killed, others were injured, and a large number lost their baggage. The HAITI suffered only minor damage to her bow, amounting to $60,040.48.

The United States as owner of the HAITI VICTORY filed a petition in the United States District Court for the Eastern District of Virginia under the Federal Limitation of Liability Statute (Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) and Admiralty Rule 51 seeking exoneration from or limitation of liability for all losses and damages resulting from the collision. Petitioner filed in this proceeding a claim of $1,500,000 for the losses and damages sustained by its vessel, the DUKE OF YORK. A number of death, personal injury and damage claimants also filed claims in varying amounts.

Some of these claimants then filed petitions in this case to implead petitioner, under the alleged authority of General Admiralty Rule 56. The District Court denied these impleading petitions, holding that other claimants could not implead petitioner for the reason that a limitation proceeding does not provide a forum for the adjudication of liability of claimants to each other (Appendix, p. 1). Then, after a trial, the District Court held that the DUKE OF YORK was solely to blame for the collision, and a final decree exonerating the HAITI VICTORY was filed in accordance with this opinion (Appendix, pp. 3-10).

On appeals by all parties, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court exonerating the HAITI VICTORY

and holding the DUKE OF YORK solely responsible for the collision. But it reversed the District Court's order denying the right of other claimants to implead petitioner under Admiralty Rule 56. While noting that the issue appeared "to be a question of first impression," the Court of Appeals held, largely in reliance upon analogies drawn from receivership proceedings, that impleader of petitioner was proper under the Admiralty Rules. It accordingly remanded the cause to the District Court for further proceedings.[2]

REASONS FOR GRANTING THE WRIT

In both the procedural and substantive parts of its decision—the bringing in of the Commission in the posture of a respondent, and the exoneration of the HAITI VICTORY—the Court of Appeals is in conflict with the law as laid down in other circuits, and has decided important questions of Federal law which have not been but should be settled by this Court.

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[2] The United States did not join with other claimants in attempting to implead petitioner in the District Court, although it filed a "cross assignment of error" on the appeal to the court below, stating that "the District Court erred in denying to claimants and to petitioner the right to cross-claim and implead the owners of the S.S. DUKE OF YORK". On remand to the District Court, following the decision of the Court of Appeals, the United States filed a so-called "cross libel" against petitioner, attempting to obtain service on petitioner by serving its proctors in this proceeding. Petitioner has moved to quash service of this cross libel and has also filed exceptions to it.

I

THE DECISION BELOW PERMITTING A CLAIMANT IN A LIMITATION PROCEEDING TO IMPLEAD UNDER ADMIRALTY RULE 56 THE OWNER OF ANOTHER VESSEL, ALLEGED TO HAVE CONTRIBUTED TO THE INJURY, CONFLICTS WITH A DECISION IN THE FIFTH CIRCUIT. IT IS A RADICAL INNOVATION IN ADMIRALTY PROCEDURE WHICH SHOULD BE REVIEWED AND REJECTED BY THIS COURT.

The court below, believing that this case presented "a question of first impression," and conceding that "the question is close and not free from difficulty," held that it was permissible under Rule 56 for claimants in this proceeding to implead the Commission, as owner of the DUKE OF YORK. While the question arose here for the first time in the Fourth Circuit, the precise point involved (that Rule 56 is inapplicable to limitation proceedings and, moreover, is never available to one in the posture of a plaintiff or libelant) has been passed upon four times adversely to the conclusion reached here—once by the Court of Appeals for the Fifth Circuit [*Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949)], and three times by the important admiralty district courts for the Southern and Eastern Districts of New York.[3]

The decision below has permitted transformation of a statutory proceeding by which the United States sought limitation from or exoneration of liability into a proceeding in which a claimant seeking redress against the United States under compulsion of a monition is-

[3] *New Jersey Barging Corp.* v. *T.D.A. Jones Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955) (appeal pending); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5, Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.).

sued at the behest of the latter may proceed against another claimant. In doing so, it is not only in conflict with the decisions in other circuits, but has jeopardized the usefulness of limitation proceedings for the purpose for which they are intended, and has authorized in the United States a practice not permitted in the other maritime nations of the world. Review by this Court is clearly called for.

1. The radical—and, we submit, erroneous—departure from the settled construction of Rule 56, and the nature of the conflict between the decision below and decisions in other circuits, require a brief reference to the history and purpose not only of Rule 56, but also of Rules 51-54, which regulate limitation proceedings. In our admiralty courts limitation procedure is over thirty years older than the third party practice which is the subject of Rule 56. The occasion for and the purpose of the latter rule had and has nothing whatever to do with the principles of limitation.

In this country, and in others where the right is granted, limitation is a legislative graft upon the principles of admiralty. As the size of ships grew with the passing of the days of sail, the liabilities which might be incurred by a shipowner in a major disaster could be so great as to discourage venturing on the sea. Maritime nations in general acted to permit limitation of liability. See Marsden, *Collisions at Sea* (10th ed.) pp. 175-178. The United States did likewise.[4] The Act of March 3, 1851 (9 Stat. 635, as amended, Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) permitted a shipowner to limit his liability for, among other things,

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[4] For a more detailed history of limitation of liability laws in this country and abroad, see *The Main* v. *Williams*, 152 U.S. 122, 126-128.

loss, damage, or injury from collision, occurring without his knowledge or privity, to his interest as owner of the vessel and her freight then pending. This Court has declared the purport of the statute to be "to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just* v. *Chambers,* 312 U. S. 383, 385. A proceeding in the admiralty to limit liability is a special proceeding, *sui generis.* 3 *Benedict on Admiralty* (6th ed. 1940) §§ 479, *et seq.*

The form of proceeding by which limitation of liability might be secured was not initially prescribed by the statute, other than that it should be "appropriate" (Rev. Stat. § 4284, 46 U.S.C. § 184); instead, procedure was provided by this Court in Rules 51-54 of the General Admiralty Rules. See *Hartford Accident Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 214. A petitioner seeking limitation of liability, as did the United States here, files his petition in the appropriate District Court, which in turn brings into concourse, by monition, all who have claims against the vessel, and enjoins all claimants from suing the owner and vessel on such claims in any other court. In the event liability is determined, the *res* in the custody of the court, if there be any (the vessel, or its value as appraised after the occurrence of the loss, and the pending freight for the voyage) is then distributed pro rata to all established claims according to their priorities, innocent parties taking precedence and death and personal injury claimants having the benefit of Rev. Stat. § 4283(b), as amended, 49 Stat. 1479-80, 46 U.S.C. § 183(b).

2. During the century and more that this limitation of liability procedure has existed, it has been judicially administered so as to marshal, determine and dispose

finally of all claims against the shipowner-petitioner. In the furtherance of *that* purpose, the Court has given the Act a broad and equitable construction. What respondents have sought here is quite different. The court below, by fusing with this proceeding, so special in nature, the totally inapplicable third party procedure provided by Rule 56 for wholly different reasons, drastically changes the proceeding from one to limit liability of a shipowner-petitioner to one where claims against other claimants may also be adjudicated.

Rule 56 is, as suggested, later in origin and rooted in different considerations. In the October term of 1876 this Court decided *The "Atlas"*, 93 U. S. 302. It held, contrary to what, based upon British precedent (*The Milan*, Lush Adm. 388, 401), was said to have been the rule in the admiralty, that a libelant might recover his damages in full from one of two parties at fault, leaving the party sued to pursue contribution from the other wrongdoer. As a result of this decision, Judge Addison Brown, a distinguished admiralty judge, held in *The Hudson*, 15 Fed. 162 (S.D.N.Y. 1883), that where a libelant had proceeded against (libeled) one of two tugs at fault in a collision, the claimant (*i. e.*, the owner of the libeled tug) might, upon petition and proper service, have the other tug "brought in as a party to the action [libel] in order that the damages might be apportioned between the two tugs, as would have been done had the [other tug] been joined as a party and adjudicated in fault." *The Hudson* was decided February 7, 1883. Rule 56 (then Rule 59) was promulgated, institutionalizing the decision, on March 26, 1883, 112 U. S. 743. For a discussion by this Court of the nexus between decision and rule see *New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 527;

see also *Benedict on Admiralty* (3d ed. 1894) § 482b, pp. 271-72.

Rule 59 as adopted in 1883 read as follows:

> "In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam,* shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued. . . . "[5]

The Hudson was a collision case, and the resulting Rule 59 of 1883 was a collision case rule. Shortly thereafter, however, Judge Brown permitted the bringing in of a third party by the claimant of the libeled ship in a cargo damage case. "The case of The Hudson, supra," he said, "and the fifty-ninth rule in admiralty though not literally applicable furnish also an analogy for this order." *The Alert,* 40 Fed. 836, 839 (S.D.N.Y. 1889). This Court referred to *The Alert* with approval in *The Barnstable,* 181 U.S. 464, 467, and since then the respondent in an action *in personam,* or claimant of the vessel proceeded against in an action *in rem* (as the case may be) have brought in third parties in libel proceedings to enforce a lien for supplies, a lien

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[5] 112 U.S. 743. The remainder of Rule 59 in its original form is substantially similar to the last two sentences of present Rule 56. See p. 4, *supra.*

for towing services, for salvage, or for stolen, misdelivered or damaged cargo. 2 *Benedict on Admiralty* (6th ed. 1940) § 349, n. 24. This practice was in turn institutionalized in the revision of the General Admiralty Rules in 1920 in which Rule 59, as revised, became Rule 56. 254 U.S., app. p. 29.

It will be noted that in the original Rule 59 the "claimant" or "respondent" who was entitled to file a petition to bring in a third party was "the claimant of any vessel proceeded against" (where the libel was *in rem*), or "any respondent proceeded against *in personam*". The "claimant" was not a person presenting a claim—one in the posture of libelant or plaintiff—but the claimant of the ship libeled—one in the posture of a defendant. When the rule was made applicable to other than collision cases, the word "claimant", as the context shows, retained that same meaning. The new language—that "in any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person"—shows that "claimant" still referred to the claimant of a vessel in an *in rem* action. It does not, as the court below appears to have assumed (Appendix, pp. 17-22), refer to a "claimant" in a limitation proceeding, who is a claimant *against* a vessel—a plaintiff—rather than a "claimant *of* any vessel proceeded against"—a defendant. The extension of the third party practice to libel actions other than those arising out of collision did not, in other words, change the basic fact that the procedure was available only to a party in the posture of a defendant—*i.e.*, a respondent or a claimant of a vessel proceeded against. A libelant, to be sure, has always been able to bring in other parties by amending his libel and serving them. He cannot, however, do so by petition under

Rule 56. *The Johan Poulsen*, 1925 A.M.C. 178 (D. Ore. 1924).

3. This reading of Rule 56, which the court below rejected, was expressly adopted by the Court of Appeals for the Fifth Circuit in *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949). The court below was under the impression that the *Jahncke* case did not decide the point at issue here. This was a misapprehension. The decision is in square conflict with the one below; if Rule 56 permits one claimant in a limitation proceeding to implead another, as the court below has held, it must perforce permit a claimant in such a proceeding similarly to implead a third party (assuming service can be had), which the Court of Appeals for the Fifth Circuit held he could not do. There is no possible basis in the language or history of Rule 56 to support a distinction between permitting impleader of a claimant in a limitation action and impleader of a third party "who may be partly or wholly liable". The District Court recognized this when it cited the *Jahncke* case as controlling its decision denying impleader: "the same principle there enforced governs here" (Appendix, pp. 1-2).

The decision below is also in square conflict with decisions in the Southern and Eastern Districts of New York. These courts have held that limitation proceedings are of such a special nature that not even the petitioner—the shipowner seeking limitation—may implead under Rule 56 either a claimant in the limitation proceedings or a third party. *New Jersey Barging Corp.* v. *T.D.A. Jones Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955) (appeal pending); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5, Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.); *cf. Algoma Central & Hudson Bay Ry. Co.* v. *Great*

Lakes Transit Corp., 86 F. 2d 708 (2d Cir. 1936), and *Moore-McCormack Lines, Inc.* v. *McMahon*, decided June 26, 1956 (2d Cir.), both discussed below. Circuit Judge Lumbard's opinion in the *New Jersey Barging Corp.* case, expressly following the *Jahncke* decision of the Court of Appeals for the Fifth Circuit, is particularly pertinent (135 F. Supp. at 99):

> "It would be odd, indeed, if a shipowner could, by the device of a limitation of liability proceeding, initiate on behalf of claimants it does not represent an action against the corporation in a jurisdiction where it could not otherwise be sued."

The leading writer on admiralty also states this as the general rule.[5] 2 *Benedict on Admiralty* (6th ed. 1940) § 349, 1955 Supp. p. 31.[6]

4. The Government apparently had little faith in the attempt to force the Commission to respond in damages under Rule 56, for it did not join the claimants in this effort. Instead, following the decision below and the remand of the cause to the District Court, the United

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[6] There are two district court cases which appear to authorize the petitioner in limitation to implead the owner of the other ship involved in a collision. *City of Boston*, 182 Fed. 171 (D. Mass. 1909); *The Clio—The Springhill*, 1948 A.M.C. 75 (S.D.N.Y.). But this appearance comes from the language of the opinions rather than the substance of the holdings. In both of these cases the owners of the vessels involved in the collisions had filed separate but simultaneous limitation proceedings in the same court. In each case one vessel owner had filed a claim in the other proceeding but not vice versa. In each case the court said that it was permitting the bringing in under Rule 56 of the vessel owner who had not filed a claim. But, in fact, that vessel owner was already proceeding for limitation in the same court. The action taken in each case was, in essence, the consolidation of the proceedings.

States filed what it calls a "cross libel", serving the Commission's proctors. Exceptions and motion to quash service have been filed in reply. (p. 7, n. 2, *supra*).

This was the procedure recently approved, we believe erroneously, by the Court of Appeals for the Second Circuit in *Moore-McCormack Lines, Inc.* v. *McMahon, supra.* It had been specifically disapproved years before by no less an authority on procedure in the admiralty than Judge Hough, because "the nature of the cause of action in limitation, the necessary framework of pleadings and the wording of Rule 50 prevents it." *The Steel Inventor,* 1925 A.M.C. 226, 228-229 (E.D.N.Y.).[7] As "persuasive," the court in the *Moore-McCormack Lines* case cited the decision below in the present case, but it did not discuss or consider the question presented here of the applicability of Rule 56 to a limitation proceeding, nor did it analyze the history or nature of either a limitation proceeding or the third-party practice in the admiralty.[8] Instead,

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[7] At a later stage of the *Steel Inventor* litigation, both vessels having been found at fault and a reference on damages having been made, the owners of cargo laden on the STEEL INVENTOR moved for leave to intervene to subject to their claims for damages any amount awarded to the United States, as owner of the U.S.S. WOOLSEY sunk in the collision. This was permitted by the Court of Appeals for the Second Circuit (24 F. 2d 657, 43 F. 2d 958, 961), and this decision in turn relied upon by that court in the *Moore-McCormack Lines* case, *supra*, as authority for permitting a cross libel. It is obvious, however, that allowance of cargo claims against a fund in the possession of the court is not the same as permitting a cross libel against a claimant, and is certainly a long way from permitting one claimant to implead another under Rule 56.

[8] There are, of course, considerations which distinguish the right of a limitation petitioner to file a cross libel from the right of one claimant to proceed against another under the guise of a Rule 56 impleader—the issue here. Whatever equitable rights there are between a limitation petitioner and a claimant against him (*cf. United*

it accepted uncritically analogies drawn from "modern civil procedure" without examining the problems which would be presented by the indiscriminate grafting of such procedure onto specialized admiralty practices:

> "As stated, we think there is authority; but in any event, approach to modern admiralty as to modern civil procedure should be to permit convenient practice where we know of no authority that forbids."

5. The idea that it is "convenient" practice to permit in limitation proceedings impleading of claimants or third parties—or cross libels against them—is quite wrong and derived from a supposed analogy to receivership proceedings. See *Alexander* v. *Hillman*, 296 U. S. 222. Indeed, that there is an analogy here is an illusion. For, if Rule 56, or a cross libel, should be enough to authorize bringing in a claimant in a limitation proceeding as a respondent, the consequences are likely to defeat rather than further the broad and salutary policies of the limitation of liability statutes. This is the answer to the argument of the court below based on the analogy of receivership proceedings. For in a receivership proceeding the court has in its control all the property of the insolvent within the jurisdiction. That property is to be distributed to creditors and the insolvent discharged from his debts. A rule that a creditor, filing a claim against the estate, subjects himself to claims by the estate is in furtherance of the purpose of the proceeding—to pay all creditors *pro rata* from the marshalled assets and to discharge

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States v. *The Thekla*, 266 U. S. 328) do not exist between persons whose only relationship is that they happened both to have filed claims in a limitation proceeding.

the insolvent. But an analogous rule is not in furtherance of a limitation proceeding.

For in the admiralty, if the ship is still afloat or if the owner has other assets, the court does not, as a practical matter, have all the property of the shipowner in its control. It has a fund equal to the value of the ship and pending freight. The ship herself may well be sailing the high seas. A foreign claimant cannot be compelled by orders of a United States court to come into limitation proceedings in the United States. *Cf. The Titanic*, 233 U.S. 718, 732. That claimant may wait until the ship enters a foreign port and libel her there.[9] The decrees and distribution of the fund in the United States court have no bearing on the foreign claimant who was never a party to the United States proceeding. So a rule which may, and will, discourage the coming in of foreign claimants, by threatening them with liability under American law, tends to defeat the purpose of the limitation proceeding, which is to entice all claimants into concourse to clear up the liability of the shipowner, and, if liability is found, to share one fund in discharge of all claims against him.[10]

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[9] In England, for example, the court is authorized to extend the period of the statute of limitations indefinitely when "there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court." Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57) Sec. 8.

[10] This is emphasized by a consideration of some of the practical effects in this case of the holding below that the mere filing of a claim in a limitation proceeding in this country subjected a British shipowner to entry of an affirmative decree for damages against it—binding on British courts, if that were possible. Under English law the Commission is entitled to initiate limitation proceedings in England, where the amount at which its liability may be limited is far lower than in the United States, generally £15 per ton of

So far as the limitation petitioner's possible counterclaim against any claimant is concerned, if he triumphs in the proceeding and is exonerated, the matter of fault is *res adjudicata* in his favor. *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708 (2d Cir. 1936). He can then either pursue his adversary where he may be served, or "file an independent libel . . . and, if territorial jurisdiction permits, try the matters together." *The Steel Inventor*, 1925 A.M.C. 226, 228 (E.D.N.Y.). It is plain that the mere filing of a claim in the limitation proceeding does not create the necessary territorial jurisdiction.

Another grave difficulty, overlooked by the court below in relying upon the analogy of a receivership, is found in the question of whether, if a claimant in a limitation proceeding is to be subjected to the possibility of affirmative recovery against him by either another claimant or by the petitioner in that proceeding, he is entitled to petition for limitation of his own liability. The Court of Appeals for the Second Circuit has held that a claimant in a limitation proceeding is not thereby given the right himself to petition for limitation of liability. *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708 (1936). In so deciding for a unanimous court Judge Learned Hand said, in discussing the nature of a limitation proceeding (86 F. 2d at 710):

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registered tonnage. Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) Sec. 503. Furthermore, the English rules of liability are substantially different from those applied in our courts. A carrier under English law may by appropriate contract and notice limit its liability for negligence, and periods of limitation for the assertion of damage or loss are different. See Collision Claims—Difference Between British and U.S. Law, Lloyds List and Shipping Gazette, July 14, 1953.

> "When there are more claims than one, a concourse is the only way to secure the owner's immunity, except at the greatest inconvenience and expense, if even these would avail. At no time can the owner recover a dollar by means of it from anybody."

If the decision below stands, the *Algoma Central* case must either be rejected or a claimant in a limitation of liability proceeding will be put in the impossible position of being subjected to liability while being deprived himself of the benefits of the limitation of liability laws. In fact, under the decision below, serious questions are presented as to how a claimant in a limitation proceeding may obtain the benefits of the limitation laws, even if the jurisdictional difficulty posed by the *Algoma Central* case is surmounted. As amended in 1936 (49 Stat. 1480), Rev. Stat. § 4285, 46 U.S.C. § 185, imposes a six-month period of limitation on the filing of such a petition after receipt by a vessel owner of a written notice of claim against him. Must every claimant in a limitation proceeding who might be held liable to the petitioner or to other claimants also petition for limitation of his own liability within this six-month period? Or is a claimant in a limitation proceeding who is impleaded by another claimant in accordance with the extraordinary doctrine enunciated by the court below entitled thereafter, without regard to the six-month limitation, to seek limitation of liability by answer or some other plea under Rev. Stat. § 4283, as amended, 46 U.S.C. § 183? Compare, *e.g.*, *The Irving*, 33 F. Supp. 59 (S.D.N.Y. 1940) and *The Joseph O'Donnell*, 37 F. Supp. 120 (E.D. N.Y. 1940) with *The Chickie*, 141 F. 2d 80 (3d Cir. 1944). These are only some of the serious questions precipitated by the determination below; they em-

phasize the faulty nature of the receivership analogy relied upon, and the necessity for review of this important question by this Court.

If we turn to the Admiralty Rules, we see that they are plainly written on the assumption that a claimant in a limitation proceeding may not as such be made to respond in damages. Due to the nomadic nature of ships, the admiralty requires that anyone instituting or entering a proceeding in which he might incur a judgment against him must put up security out of which the judgment might, if necessary, be paid. One filing a libel, or a cross libel under Rule 50, is required to do this. So, also, the petitioner in a limitation proceeding must turn over the ship and the freight to a trustee or file a bond in equal amount. But there is no provision requiring a claimant in a limitation proceeding to put up security at all. Very clearly this is because neither the Act of 1851 nor the Rules contemplated that such a claimant could be subjected to any liability. The purpose of the Act and the Rules is to bring all claims against the petitioning shipowner into concourse, both so as to limit his liability, if he is found at fault, and to discharge it if he is found entitled to exoneration. It is not to attempt a settlement of all claims *inter se*.

And it is further significant that Rule 56, formulated after thirty years of limitation proceedings, not only makes no reference to them, but is drawn to exclude them. For the rule is very specific upon the nature of the proceeding to which the rule is applicable. It is applicable to *libel* proceedings, whether *in rem* or *in personam*—a category into which limitation proceedings do not fall. The language of the rule makes this clear. First, as to the time when the rule may be invoked, it may be done "before or at the time of answering *the libel.*" Second, the rule provides that after service of

the petition to implead on the third party, "such suit shall proceed as if such vessel or person had been *originally proceeded against.*" Now it is only in a libel—and certainly not in a limitation proceeding—that a ship, or its owner, alleged to have been at fault is *"originally proceeded against."* Third, the rule goes on to provide that, after service of the petition to implead, the "new party shall answer the libel." In short, the whole wording of Rule 56 is directed towards its availability in libel proceedings and its inapplicability to limitation proceedings.

6. Finally, as this Court has recognized (*Just v. Chambers, supra*), the principle of limitation of liability is common to all the maritime nations of the world; but impleader of claimants in such proceedings, as allowed by the court below, is unknown. Since this decision will have international as well as national impact, the question should be reviewed and settled by this Court.

In England, for example, the right is now embodied in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) and other statutes. The petition for limitation of liability is made to the Admiralty Registrar in accordance with Rule LV (H) of the Rules of the Supreme Court [see The Annual Practice 1956 (London, 1956), pp. 1211c to 1212]; which makes no provision for either counterclaims or impleaders among co-claimants.

Likewise, in the continental countries impleader is unheard of. In France, the owner of a vessel can in effect exonerate himself from liability (if without personal fault) by "abandon" of vessel and freight. Code Comm., Art. 216. The owner may, in such a proceeding, assert a "compensation" (a set-off, but not an affirmative judgment) against a claimant, but even this slight "broadening" of the limitation action which France

alone among the continental countries appears to sanction, has been criticized. See Ripert, Droit maritime (1952 ed.) Sec. 1322. The rule (except for "compensation") is the same in Belgium (Code de Comm., L. II, Art. 46 *et seq.*; see Répert. prat. du droit belge, VIII, V° "Navire-Navigation," Nos. 318-321 (1951), Italy (Cod. di Comm., Arts. 491 *et seq.*; Cod. di Navig. (1941) Arts. 275-277, 620 *et seq.*; see d'Ovidio-Pescatore, Manuale di diritto della navigazione (1950) pp. 442 *et seq.*) and Holland (Comm. Code, Art. 541, see Woltman, De Bepertke Aansprakelijkheid van den Reeder (Leiden, 1936), p. 211).

In Germany the concept prevails that the vessel itself, and not the owner, is responsible for damages done by it, and hence the responsibility of the owner of the vessel, unless personally negligent, is limited from the outset to his interest in the vessel. Under the German system there is no need for proceedings to limit liability or to declare "abandon" and have it approved by the court, and no occasion for any procedural move which resembles impleader. German Commercial Code (HGB) sec. 486; Wüstendörfer, Neuzeitliches Seehandelsrecht (1950 ed.) pp. 125-130, 133; Gierke, Handelsrecht und Schiffahrtsrecht (1955 ed.) Sec. 81; see Ripert, *supra*, Sec. 1283. The concept of limitation of liability in the Scandinavian countries generally follows the German pattern. [11]

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[11] The Brussels Convention of August 25, 1924 (League of Nations Treaty Series, No. 2763) has been ratified by a number of countries and has produced some uniformity in respect to the *amount* of liability to which the owner is to be held subject in a limitation proceeding. It has not been ratified by the United States, the United Kingdom, or Germany. Currently efforts are being made to rewrite the Convention to increase the scale of liability so as to encourage its broader adoption. See Le droit maritime francais, Vol. VIII, p. 1. (Jan. 1956).

Neither in the codes of these various countries, nor in the commentators upon them, have we found a suggestion that the result reached by the court below is even possible. The limitation proceedings remain restricted to the original parties in the position which they occupied at the outset. The exoneration of a vessel involved in a collision would terminate the proceedings, and a new action would be required in order to assert any claim against the other vessel. A decision which permits imposition of liability upon foreign shipowners in a way which is so drastically different from that permitted by the law of other maritime nations should be reviewed and evaluated by this Court.

II

THE DECISION PERMITTING THE HAITI VICTORY TO CHOOSE "TO REMAIN BLIND WHEN SHE HAD MEANS TO SEE" IS AN ANACHRONISM IN CONFLICT WITH BASIC PRINCIPLES ACCEPTED AND APPLIED BY OTHER COURTS, PARTICULARLY THE COURT OF APPEALS FOR THE SECOND CIRCUIT. IT PRESENTS AN IMPORTANT QUESTION UNDER THE INTERNATIONAL RULES WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Unusual as this is in collision cases, the present case has not presented any major conflict of testimony; all agree substantially on what took place, and when. But in exonerating the HAITI VICTORY on these facts, the lower court cut adrift from important principles laid down by the admiralty courts in this country and abroad. If its decision stands, it will confuse and relax accepted standards under the International Regulations for Preventing Collisions at Sea. A summary of the relevant facts found by the two lower courts will make this clear.

A. THE FACTS [12]

The HAITI VICTORY is a 439 foot single-screw Victory ship, equipped with radar. On May 6, 1953, bound up the English Channel for Bremerhaven, she took on a Trinity House pilot at Dover, just after 0117 British summer time. Her course took her slightly to the east of Galloper Lightship, off Harwich, England. She was maintaining her maximum speed of 17-18 knots (Appendix, pp. 4-5).

The collision occurred in the darkness shortly before dawn, some two miles east of Galloper Lightship, when the DUKE OF YORK emerged on a crossing course from an undetected patch of fog on the HAITI VICTORY's starboard bow (Appendix, pp. 3-5). In the words of the HAITI VICTORY's pilot, this area was "the meeting place of two lanes of shipping" (Tr. 151). In fact, as the District Court noted, very shortly before the collision the HAITI VICTORY had been required to make a sharp alteration of course to starboard to avoid another ship, the lights of which had been first seen some four to five miles away (Appendix, pp. 4-5, 8). It is undisputed, too, that traffic along the whole route from Dover to Galloper had been very heavy, the HAITI VICTORY's pilot stating that he had sighted some 50 ships on the way (Tr. 134).

Both courts below found that there were no actual signs of fog prior to the time the DUKE OF YORK was discovered off the HAITI VICTORY's starboard bow, and that the HAITI VICTORY accordingly neither knew nor

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[12] Although the Commission urged below that the DUKE OF YORK should not have been held at fault and still believes this position supported by the record, it recognizes that this now presents no issue appropriate for this Court. Accordingly, the DUKE OF YORK's actions are not discussed in detail.

should have known of the existence of the fog patch along her track (Appendix, pp. 7-8, 15). On the other hand, the District Court recognized that "the HAITI VICTORY'S master did not completely undress on turning in, staying ready for any call, including a fog alarm", and it referred to testimony that fogs were frequent in the North Sea at that time of year (Appendix, p. 9).[13] It further found that on this particular night a meteorological cold front was moving over the North Sea from northeast to southwest. It included drizzle, overcast, and patches of fog with very poor visibility. At 0400 hours the front itself was still some 60 miles northeast of Galloper Lightship but was twice as far down the European coast as it was on the English side. Visibility along the English coast was "fair", but the "night was dark" (Appendix, p. 6). As early as 0300, an hour and quarter before the collision, the weather around Galloper Lightship was already "cloudy with wet dew," overcast with moon or stars visible only at times (Appendix, p. 6). Shortly before the collision, the HAITI VICTORY'S pilot thought there was still good visibility, but he noted that "it was

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[13] The master of the HAITI VICTORY testified that he knew that fog shows up "quite often through there. And very unexpected, so you usually are ready for it" (Tr. 245). His testimony is confirmed by *Sailing Directions for the East Coast of England* (U.S. Navy H. O. Pub. No. 150, 5th ed. 1951), which states that "fog and mists occur at all seasons of the year in the vicinity of the English coast. Thick weather, verging on fog is very common." It goes on to say that along the whole East Coast of England, "fog occurs on from six to ten days" in the months of April and May (Par. 1-40, pp. 10-11). The HAITI VICTORY herself had experienced fog the previous day (Tr. 189, 194).

a smooth sea and a grey sky and there was no horizon anywhere" (Tr. 164).[14]

The HAITI VICTORY was equipped with a modern and efficient radar, the viewing scope of which was located on the bridge itself, to starboard of the wheel and slightly abaft the engine telegraphs (Tr. 187-88, 264-65). After leaving Dover the set was turned to "standby"—a position in which it was not in actual operation but from which it could be turned on instantly if needed. It was apparently not kept in continuous operation because no fog was known to be about and because, as the court below stated, some of its components had a short life and it was therefore desirable to ration its use (Appendix, p. 16). Although kept on "standby", there is no indication that it was again used, even for an intermittent check, until several minutes before the collision, when the HAITI VICTORY's second mate turned it on in order to ascertain his distance from Galloper Lightship (Appendix, pp. 9, 16-17; Tr. 160-61, 191). Even then, no real attention was paid to it. Although, so the District Court found, the DUKE OF YORK was probably visible on the radar screen at the time this navigational check was made by the second mate, the ship was not observed or reported (Appendix, p. 9). The first radar observation of the DUKE OF YORK came after the DUKE's fog whistle had been heard off the starboard bow, when the pilot, unable to see anything in that direction, ran to the radar and immediately observed on the screen what turned out to be the DUKE, then only ap-

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[14] In the quarter in which in fact there was a fog bank which hid the DUKE OF YORK from view, the HAITI VICTORY's second mate similarly noted that this "was very difficult to see because it was right in the quarter of daybreak with the low overcast sky. The sky and sea merge so there was no visible horizon" (Tr. 204).

proximately one-half mile away and 35° on the starboard bow.

B. THE QUESTION PRESENTED IS ONE OF IMPORTANCE TO THE MARITIME WORLD WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The nature of the duty imposed upon a ship equipped with radar to use it is one of first impression in this Court. The present decision gives an extraordinarily narrow interpretation to the obligation imposed by the general precautionary rule[15] on a radar-equipped vessel proceeding at high speed through darkness in crowded waters where fog is frequent. It ignores the principal value of radar as an anti-collision device—its use to prevent hazardous close quarter situations from developing and thus to avoid the dangers lurking in *undiscovered* as well as known fog banks or other areas of impaired visibility. It runs counter to principles clearly established in the Second Circuit and widely accepted by other courts and writers. It has introduced doubt and confusion into an increasingly vital area of maritime responsibility, and has unnecessarily set back the clock on the program of safety at sea. This Court should review and reverse the decision.

"Radar"—a word derived from Ra[dio] D[etection] A[nd] R[anging]—is an electronic device perfected during World War II which produces immediate and accurate distances and bearings on objects within the instrument's range. It is hard to overemphasize the importance of the contribution which this invention has made to safety at sea. The United States Coast Guard has described it as "the best anti-collision device yet perfected." In 1949, it commented that:

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[15] Article 29 of the Regulations for Preventing Collisions at Sea. See p. 5, *supra*.

"This remarkable technological achievement, conceived long before the war but brought to practical success only by the impact of war, has become one of the most important single safety features put to use on merchant ships. As time goes by, it can be reasonably expected that Radar scopes on bridges of ships will be as common sights as gyrocompasses." [16]

Recent statistics bear out this Coast Guard prediction, and emphasize the increasing need for a definitive determination of the nature of the duties and responsibilities to which its availability gives rise. [17] Data com-

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[16] *Ocean Electronic Navigational Aids* (USCG Pub. CG 157, 1949) p. 41. The Coast Guard is by no means alone in its high appraisal of the value of radar. Mr. E. C. Phillips, of the National Federation of American Shipping, has stated:

"As a technical organization we know that in radar our vessels have been given one of the most potentially important and useful devices ever to be conceived. We know that it can provide a safety factor unsurpassed by any other device aboard ship. We know that time and again it has proved an economic advantage. We know that ship masters who have once been subjected to its abilities look upon it as a favored instrument." "Five Years Progress in the Application of Radar to Marine Navigation", p. 4, Radio Technical Commission for Marine Services, Symposium Papers Delivered at Spring Assembly Meeting, Baltimore, Md., April 19-20, 1951.

[17] A representative of the National Federation of American Shipping has reported that "the most significant aspect of radar in the eyes of the shipping industry is its legal aspect." See Phillips, "Five Years Progress in the Application of Radar to Marine Navigation," p. 1, *supra* note 16. The question of the impact of radar on the legal responsibility of shipowners has received considerable attention from commentators. See *e.g.*, Griffin, *American Law of Collision* (1949) § 133; Wiley, "Radar and the Rules of the Road at Sea", *Journal of the Institute of Navigation*, January,

piled by the American Bureau of Shipping and the Maritime Administration of the Department of Commerce, for example, indicate that more than half of the privately owned American ocean-going vessels of 1,000 gross tons and over were equipped with radar as of December 31, 1955, and that all such passenger-carrying vessels of 10,000 tons and over were so equipped. The Annual Report of the Federal Communications Commission for 1955 (p. 72) reports that as of June 30 of that year "more than 2,600 United States ships were authorized to use radar". Comparable or even greater use of radar by British vessels is indicated.[18] Certainly the widespread practical importance of ship-borne radar today is beyond question.

C. THE DECISION BELOW IS INCONSISTENT WITH THE SECOND CIRCUIT RULE ON THE DUTY TO USE RADAR WHEN AVAILABLE.

The leading case on the duty of a vessel equipped with radar to use it is Judge Byers' decision in *The Medford,* 65 F. Supp. 622 (E.D. N.Y. 1946). In this case the S.S. THOMAS BARRY, a U. S. Army transport equipped with radar, entered a fog bank without having its radar set in operation. It then struck and sank the trawler MEDFORD. The Court said (65 F. Supp. at 626-27):

1950, p. 10; Kerrins, "Effect of Radar on Collision Law," *Proceedings of American Merchant Marine Conference* (1948), vol. 13, p. 190.

[18] Official statistics furnished by the British Ministry of Transport show that as of October 31, 1955 some 70% of all ships of 1600 gross tons or more registered in the United Kingdom were fitted with radar. The Liverpool Underwriters Association 153d Annual Report, 1954 (p. 15) estimated that over 7000 vessels were then fitted with radar equipment, and that it was being installed in British and foreign vessels at the rate of some 1000 per year.

"The failure of the *Barry* to use her radar is the most serious and sinister aspect of these causes. The perfection of that device is thought to have invoked a new concept of the responsibilities attaching to vessels so equipped, touching their handling and operation in or near a fog-bound area. . . . It is impossible to yield to the argument for the *Barry* that her conduct is to be condoned to any extent, in view of her failure to employ the very device which was installed to prevent a collision. . . ."

This rule was soon approved and applied by the Court of Appeals for the Second Circuit in litigation arising out of a wartime collision between two merchant ships, the HINDOO and the AUSTRALIA STAR. On a dark but clear night, under blackout conditions, the AUSTRALIA STAR's skipper received from her radar operator word of vessels (the HINDOO and her naval patrol-craft escort) on a crossing course, at first seven to eight and later three miles away. The AUSTRALIA STAR turned on her navigation lights and they remained on until the collision occurred, some twelve minutes later. But the skipper did not request and the operator did not furnish any further radar report. The HINDOO was not equipped with radar and did not turn on her navigation lights until the moment of collision.

Judge Rifkind held both vessels at fault. The fault of the AUSTRALIA STAR, he ruled, was in "failure to make adequate use of the radar facilities" with which she was equipped. He held that this failure was a violation of the general precautionary rule embodied in Article 29 of the International Regulations for Preventing Collisions at Sea (*supra*, p. 5), even though the AUSTRALIA STAR had switched on her navigation

lights in ample time and so had made herself known to the other vessel (*The Hindoo*, 74 F. Supp. 145, 149):

> "It has been suggested that to hold the Australia Star at fault is to penalize her because of her equipment with radar. That is a misconception. The conduct which is regarded as negligent on the part of a person of sound vision is not the same as that which is condemned when practiced by the blind. The fault of the Australia Star is that she chose to remain blind when she had the means to see.
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> "Prudent navigation involves taking advantage of all the safety devices at hand. Insofar as it is the judicial function to fit scientific discoveries into the framework of laws not tailored to their measure, the function should be carried out with an eye to the general purposes of the law, and to desirable social ends." [19]

The Court of Appeals affirmed on this point, emphasizing the fault of the AUSTRALIA STAR in failing to utilize her available radar after having turned on her navigation lights. *United States* v. *The Australia Star*, 172 F.2d 472, 475-76 (2d Cir. 1949).

Except for the decision below, no case has been found which departs from the principles thus applied in the Second Circuit, [20] and they find their counterpart in British and Canadian decisions.

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[19] See approving comments on this principle by Capt. J. E. Madacey, U.S. Coast Guard Staff, Office of Merchant Marine Safety, in "Are We Getting the Most from What We Have," pp. 8, 9, Radio Technical Commission for Marine Services, Symposium Papers Delivered at Spring Assembly Meeting, Washington, D. C., April 20-22, 1953.

[20] Of course, it is not negligence to shut off a radar set which is malfunctioning and not producing usable data (*Pocahontas S.S. Co.*

In *The Esso Plymouth*, [1955] 1 Lloyd's Rep. 429 (Adm. Div.), a British admiralty court held a ship at fault for failing, among other things, to use her radar when approaching a bank of smoke. The court said (at 437):

> "Moreover, the 'Esso PLYMOUTH' had on board a potential silent look-out, which could have been used if it had been made available in time. In saying that I am speaking of her radar instrument. It must have been known to those in charge of her from the time she rounded Tilbury Ness that she would run into this bank of smoke when she got to the top of Northfleet Hope. She had plenty of time to switch on her radar, and, if that had been done, it would have been working before the 'ESSO PLYMOUTH' reached the bank of smoke. I assume that if it had been working some earlier notice of the presence of the QUEENSLAND and ELBLAG would have been received by her, and in those circumstances, it seems likely that steps would have been taken at a much earlier stage to reduce the risk of collision. I can think of no good reason why there was that unfortunate delay in switching on the radar of the 'Esso PLYMOUTH'."

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v. *The Esso Aruba*, 94 F. Supp. 486 (D. Mass. 1950) aff'd, 197 F.2d 422 (1st Cir. 1952)), nor does failure to be equipped with an adequate search radar yet make a ship unseaworthy (*Anglo Saxon Petroleum Co., Ltd.* v. *United States*, 88 F. Supp. 158 (D. Mass. 1950). Conversely, the use of radar does not excuse excessive speed in fog (*Wood* v. *United States*, 125 F. Supp. 42 (S.D. N.Y. 1954)). None of this has any bearing on the obligation of a ship equipped with accurate and fully operative radar to use it where such use might enable avoidance of disaster.

See also *The Chusan*, [1955] 2 Lloyd's Rep. 685, 694-95 (Adm. Div.), where it was said to be "a part of any seaman's duty, in the exercise of reasonable care, to take full advantage of any equipment with which his vessel is equipped", and *The Dagmar Salen* v. *Puget Sound Navigation Co.*, [1951] S.C.R. 608, 613, 1951 A.M.C. 1253, 1258, where the Supreme Court of Canada condemned both radar-equipped ships involved in a collision, but assessed two-thirds of the damages against the ship failing to observe her radar: "If the radar screen had been closely and accurately observed, the course of the Dagmar would have been clear and the risk eliminated."

Indeed, the rule of the Second Circuit—as stated by Judge Rifkind, that a ship may not choose "to remain blind when she had the means to see"—is not a novel doctrine, afloat or ashore; it is merely an application of the tort principle that one endowed with superior qualities of perception or having available a superior instrumentality must utilize them, if to do so would eliminate undue risk of harm to others. *Restatement, Torts*, § 298, especially comment *c*; Seavey, *Negligence, Subjective or Objective*, 41 Harv. L. Rev. 1, 13-15 (1927); Prosser, *Torts* (2d ed. 1955) pp. 126, 132.[21] As Professor James has said:

> "As scientific knowledge advances, more risks can be discovered and avoided. Those who deal

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[21] This principle has in fact been applied by the courts in a number of instances such as, *e.g.*, the duty imposed upon physicians to use available X-ray machines to assist in their diagnoses, although they would not be liable for malpractice had no such device been available to them. *E.g.*, *Rankin* v. *Mills*, 207 Cal. 438, 278 Pac. 1044 (1929); *Whitson* v. *Hillis*, 55 N.D. 797, 215 N.W. 480 (1927); *Kalloch* v. *Hoageland*, 239 Fed. 252 (6th Cir. 1917). See Note, 27 Cornell L.Q. 577 (1942).

> with matters affected by these advances must keep reasonably abreast of them. What is excusable ignorance today may be negligence tomorrow. . . . Only a few years ago there was no way to detect a transverse fissure in a steel rail. Today this can be done by the Sperry Detector car and the conduct of railroads will be judged in the light of this fact." [James, *The Qualities of the Reasonable Man in Negligence Cases,* 16 Mo. L. Rev. 13-14 (1951)].

Nearly 25 years ago Judge Learned Hand went considerably further than this when he held for a unanimous court that it was negligence for coast-wise tugs to remain deaf to available weather reports when they could provide themselves with readily available ears in the form of inexpensive radio receiving sets. *The T. J. Hooper,* 60 F.2d 737, 740 (2d Cir. 1932):

> "Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omissions" (60 F.2d at 740).

As the facts stated above show, these principles are directly applicable in this case. The two courts below found that the HAITI VICTORY was "neither in a fog nor chargeable with notice of the nearby fog patch" (Appendix, pp. 7, 15). Although petitioner urged below and still believes that these findings are erroneous, [22] they are accepted here, as they must be. *Mahnich*

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[22] See, *e.g.*, testimony of the HAITI VICTORY'S second mate that at the time the DUKE'S whistle was reported he noticed a halo of fog around his own masthead light (Taylor, Tr. 194). It is unlikely in the extreme that such signs of fog had at that moment first appeared.

v. *Southern Steamship Co.*, 321 U.S. 97, 98-99. But there can also be no dispute that the likelihood of fog was sufficiently great to justify what the District Court called certain "precautions" against it; and that the HAITI VICTORY was proceeding at high speed on a dark and overcast night in a heavily traveled coastal area where fog was frequent, believing the weather to be clear on the basis of visual evidence, but without knowing whether or not in some quarters there were fog patches which could not be seen.

If the HAITI VICTORY had had no means of protection against this hazard, serious though it might be, she may well have been within her rights in taking this action. *Cf. The Canadian Mariner*, 39 Lloyd's L. Rep. 179, 181 (C.A. 1931); *The Themistocles*, 4 Lloyd's L. Rep. 107 (C.A. 1919). Even in heavily traveled waters a ship without radar is not at fault for failing to sight a vessel hidden by undiscoverable fog, any more than a blind man crossing a street is at fault for being unaware that a speeding automobile is bearing down on him. The situation is very different, however, where the ship has sight through radar. The HAITI VICTORY had readily at hand the means to protect herself against the extreme dangers presented by undetected fog patches in this crossroads of shipping lanes.[23]

The HAITI VICTORY's radar was turned on "standby"

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[23] The HAITI VICTORY's radar had a minimum range of 80 yards and a maximum range of 81,070 yards (over 40 miles), with a range accuracy of ±1% and a bearing accuracy of ±2°. The range scale in use at any time could be set manually at 1½, 4, 8, 20 or 40 miles, for close-in or distant search (Tr. 264). At the time of the collision, it was operating on the 4-mile scale (Tr. 191, 216). The "PPI" viewing scope, 12 inches in diameter, was located on the bridge itself (Tr. 187-88, 215, 265).

The PPI or "Plan Position Indicator" scope somewhat resembles

—ready for use—yet no effort was made to use it even for the few seconds needed from time to time to make a periodic search or check. Fog as such, of course, is not detectable on radar, any more than it can be seen by eye on a dark night, but any ship or other danger which is obscured by fog will be discovered if radar is used. The explanation that its use had to be rationed because of the relatively short life of some of its components (Appendix, p. 16) is no justification for failure to use it for at least brief intermittent searches. It was, in fact, so used by the second mate for a navigational check of the Galloper Lightship, then being passed to port. This was done at approximately 0414 hours—a minute before the DUKE OF YORK's whistle was first heard and when the collision could still clearly have been avoided. Yet not even a glance was given to see whether any "blip" appeared on the radar screen which could not be verified visually. The explanation given by the District Court and approved by the Court of Appeals for this almost incredible failure of the second mate to see the DUKE OF YORK on the radar scope was that:

> "he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the DUKE was not negligence, for it was not the result of neglect of

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a small television screen in appearance. The viewer's own ship is located at the center of the picture, and land, structures and other ships appear as "blips" of light elsewhere on the scope. Their distance and bearing may be read off directly from range and bearing scales on and around the scope itself. For a more detailed explanation and illustrations of radar scopes and their operation, see Wylie, *The Use of Radar at Sea* (1953) pp. 1, 25, 34, 85-95; Sonnenberg, *Radar and Electronic Navigation* (2d ed. 1955) pp. 195-209; Penrose and Boulding, *Principles and Practice of Radar* (5th ed. 1955) pp. 358-84.

an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it." (Appendix, pp. 9, 16-17).

In other words, without some affirmative visual indication that fog or obscurity actually existed in some quarter—and of course such fog or obscurity could not be seen visually on a dark and overcast night with no horizon visible—there was no duty to use a readily available method of ascertaining with certainty the existence of the extreme hazards which such possible fog or obscurity might hide.

The court below, in effect, writes out of the general precautionary rule the duty of the prudent navigator imposed in the Second Circuit, when proceeding in shipping lanes on a dark night, to take advantage of all the safety devices at hand—specifically to use radar to detect objects which, except for the unexpected, should be within visible range, but which in fact cannot be seen.[24]

The essence of the matter is summed up by a recent writer:

> "Radar has proved itself to be of great value as an aid to avoiding collision in fog. The advantage which it confers, however, is not so much in assisting dramatic last-minute avoidance, as in enabling potentially dangerous circumstances to be rectified

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[24] The HAITI VICTORY's pilot instantly recognized the necessity for this use upon hearing the DUKE OF YORK's whistle and seeing nothing. He immediately ran to the radar, and there saw the DUKE. "Once I saw it on the target on the radar, I couldn't see with my eyes. I was no longer puzzled. I was very worried" (Tr. 153). He testified that he then knew that he must be running alongside a fog bank—as in fact he was (Tr. 143).

in their early stages. In studying the use of radar for this purpose it is most important to appreciate that radar is not at its best in rapidly changing close-quarter situations, and that much depends on the manner in which the limited contribution it can make is used. . . ."[25]

This very use—to provide an early warning of the existence of an approaching ship and of the unseen fog bank which hid her from view—was the use to which the HAITI VICTORY should have put her radar. Had she done so, there is no doubt but that the collision would have been avoided. The decision below is a backward step which can serve only to discount the enormous potential contribution to safety at sea of this great invention. The question presented is thus one which this Court should review and settle for the guidance of the merchant marine as well as of the lower courts.

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[25] Wylie, *The Use of Radar At Sea* (1953) p. 134. See also "The Cause of Collisions at Sea with Radar", in *Journal of the Institute of Navigation*, April, 1955, pp. 125, 135: "The most important thing that radar gave me as a commanding offieer was the fact that you did not allow a close situation to develop."

Of course no suggestion is made that radar is a substitute for the exercise of skill and judgment, or that it provides any excuse for failure to comply with the Regulations for Prevention of Collisions at Sea. *Cf., e.g., Wood v. United States*, 125 F. Supp. 42 (S.D. N.Y. 1954); *The Prins Alexander*, [1955] 2 Lloyd's Rep. 1 (H.L.); *The Ship "Baranof" v. D. Gratsos et al.*, [1953] Ex. C. R. 74, 1953 A.M.C. 393 (Brit. Columbia Exch.), aff'd. Sup. Ct. Canada, March 8, 1954 (unreported). A great many collisions have occurred between radar equipped ships, a number of them attributable at least in part to careless or improper use of radar as well as the failure to use it at all. See compilation of collision statistics in 18 *Proceedings of Merchant Marine Council 1950-52*, pp. 190-213. This merely emphasizes the importance of clarifying the duty to use this potentially magnificent safety device, and to use it properly.

III

THE DECISION EXONERATING THE HAITI VICTORY IN SPITE OF A PLAIN STATUTORY FAULT IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

The second paragraph of Article 16 of the Regulations for Preventing Collisions at Sea provides (p. 5, *supra*):

> "A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." [26]

The law has been settled since at least *The Pennsylvania*, 19 Wall. 125, that a ship whose conduct has violated a statutory duty is not entitled to exoneration from liability for an ensuing collision unless it can meet the burden of showing "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" (19 Wall. at 136). In refusing to apply this rule here, the court below has disregarded important principles enunciated by this Court, has rendered a decision in conflict with applicable decisions of two other courts of appeals, and has created a precedent which can only result in confusion in an important area of admiralty law.

The undisputed events directly leading up to the collision, as summarized by the Court of Appeals, were as follows:

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[26] The corresponding paragraph of Rule 16 of the Revised Regulations for Preventing Collisions at Sea, effective January 1, 1954, is identical except that the phrase "power-driven vessel" is substituted for "steam vessel". See 65 Stat. 417, 33 U.S.C. § 145n.

"The first notice those on the HAITI had of the presence of the DUKE was a single blast whistle from the DUKE. The bow lookout of the HAITI promptly reported to the bridge by telephone that he had heard what he thought was *a ship's whistle off the* HAITI's *starboard bow*. This whistle was also heard by the helmsman and pilot of the HAITI. The time, then, was apparently *about 0414*.

"'The pilot dashed out on the starboard side of the wheelhouse, looked around, saw nothing and went to the radar which disclosed an echo off the starboard bow. He again went out, saw nothing and *stopped the engines, around 0415*. Those on the HAITI *thought the single blast they heard was a fog signal*, but they were not sure of this.

"Apparently in about a minute, the HAITI pilot saw the DUKE crossing from starboard to port, gave the order hard right, blew one short blast and went full speed astern. The full speed astern was logged on the HAITI at 0415½, *the collision at 0416*. The HAITI changed course from 036° to 079° before striking the DUKE. The pilot of the HAITI testified that when he first saw the DUKE looming out of the fog, there was nothing that could be done by the HAITI beyond the hard right and full speed astern. A survey of the deformation of the plates, which is the resultant of the velocities of the ships, showed the speed of the DUKE, at the moment of impact, to be from 2 to 4 times the speed of the HAITI" (Appendix, p. 15) (italics supplied).[27]

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[27] The District Court's findings were similarly that the DUKE's fog whistle was heard "just after 0414 hours", being reported by the forward lookout as "off the starboard bow", and that the pilot finally stopped his engines at "0415 hours". The ships were together "at 0416" (Appendix, p. 5).

Thus, although the HAITI VICTORY was proceeding at her full speed of 17-18 knots, her pilot did not immediately stop her engines upon hearing the fog signal forward of the beam, as required by the statute. Instead, he wasted what both courts below found to be about a minute in first vainly attempting to locate the ship visually from the starboard wing of the bridge, then in running to the radar where he did find it on the bearing approximately indicated by the sound of the whistle, then in returning to the wing of the bridge to look futilely into the fog bank a second time—all before giving the order to stop engines.

The importance of the specific rules of conduct laid down by Article 16 was made perfectly plain by this Court in *Lie* v. *San Francisco & Portland S.S. Co.*, 243 U.S. 291, 296:

> "The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog, renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule."

The decision of the court below exonerating the HAITI VICTORY in spite of a clear violation of this Article is not only inconsistent with the interpretation of Article 16 by this Court in the *Lie* case, but is squarely in conflict with decisions of the Courts of Appeals for the Second and Ninth Circuits in very comparable circumstances. *Johnston-Warren Lines* v. *United States*, 196 F.2d 689 (2d Cir. 1952); *The Silver Palm*, 94 F.2d 754.

(9th Cir. 1938). It is not clear whether the court below disregarded the violation of Article 16 on the theory that the HAITI VICTORY's people were not at first *certain* that the whistle they heard off the starboard bow was a fog signal (although admittedly they thought it was), or on the ground that the Article requires only an early, not an immediate stoppage of the engines.[28] In either event, the conflict with the decisions of the Second and Ninth Circuits is clear.

In the *Johnston-Warren* case, a lookout "thought" he heard a fog signal forward of the beam; the ship's third mate, not being sure, waited approximately one minute (as did the HAITI VICTORY's pilot here), until he himself heard the signal repeated, before giving the order to stop. Although in the *Johnston-Warren* case the ship was proceeding at a relatively modest speed, the court held that she was at fault in failing to stop her engines immediately:

> "Thus, at a speed of six knots, over 600 feet was traveled in that interval, bringing the Longview that much nearer to the path of the Jessmore. As far as we are concerned, the only sensible interpretation of an anti-collision rule like Article 16 is that the ships must stop *when they hear something which they have good reason to suspect is a fog whistle ahead*" (196 F.2d at 691) (italics supplied).

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[28] That this latter theory may have been a basis for the court's decision is indicated by its citation of *The Anna M. Fahy*, 153 Fed. 866 (2d Cir. 1907), a case which did not involve Article 16 or a collision in fog at all, but had to do only with the statutory duty of a vessel owner to mark with a buoy a submerged vessel which constitutes a hazard to navigation. In the course of its decision the court remarked, *obiter*, that the word "immediately" as used in a statute might in some contexts mean within a reasonable time.

The Court of Appeals for the Second Circuit distinguished its earlier decision in *Steffens* v. *United States*, 32 F.2d 206 (1929), in which it was uncertain whether the signal heard came from forward of the beam or from a bearing further aft. Here the whistle was described by both courts below (and by all of the HAITI VICTORY's witnesses[29]) as coming from the starboard bow, and the evidence in support of the Court of Appeals' statement that "those on the HAITI thought the single blast they heard was a fog signal"—which in fact it was—is equally clear.[30] Application of the Second Circuit rule that engines must be immediately stopped on hearing something ahead that is even suspected to be a fog whistle would plainly have condemned the HAITI VICTORY here.

Similarly, in *The Silver Palm*, 94 F.2d 754, the USS CHICAGO was proceeding at 18 knots between two fog banks when she heard the fog whistle of another ship forward of her beam. She thereupon reduced speed to about 12 knots which she maintained for about one minute before her engines were stopped—a delay again approximating that of the HAITI VICTORY. She was condemned by the Court of Appeals for the Ninth Circuit, *inter alia*, for failing to stop her engines immediately upon hearing the fog whistle. The court made it very plain that at least in that circuit Article 16 requires engines to be stopped at once—"instanter"—

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[29] Hanczyk, Tr. 79, 80, 89; Lyden, Tr. 107; Morris, Tr. 149; Taylor, Tr. 193, 201.

[30] The HAITI VICTORY's pilot admitted that he thought that the whistle he heard was "most probably a fog signal" (Morris, Tr. 151, 152), and that between the time he heard the whistle and looked at the radar he was convinced he was running along a fog bank (Tr. 143). Her second mate also admitted that he had noted visual indications of fog immediately after receiving the report of the DUKE's whistle (Taylor, Tr. 194), and he, like the pilot, surmised that the whistle was a fog whistle (Tr. 209, 219-20).

and not after a while:

> "No command is more imperative on a steam vessel proceeding in the fog than that instanter on her hearing the whistle of a concealed vessel forward of her beam, the engines shall be stopped" (94 F.2d at 761).

No suggestion was made by either court below that the HAITI VICTORY in these proceedings made any effort to meet the burden of showing that her failure to stop her engines for almost a full minute did not contribute to the collision. Such an effort would obviously have been fruitless, since at 17 knots she moved through the water a distance of some 1,700 feet in the time lost by the delay (as compared with only 600 feet in the *Johnston-Warren* case.) Had she been only a fraction of this distance further back on her track, the DUKE OF YORK would obviously have cleared ahead of her, and the collision would have been avoided. Compare also *The Suffolk*, 258 Fed. 219 (2d Cir. 1919); *New York & Cuba Mail S.S. Co. v. United States*, 16 F. 2d. 945 (2d Cir. 1927), cert. denied, 274 U.S. 753. This question is academic, however, since under the *Pennsylvania* rule the HAITI VICTORY had the burden of affirmatively showing that her failure to stop engines promptly "could not have been" one of the causes of the collision, and there was neither a finding nor evidence to this effect.[31]

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[31] The District Court properly determined that "no fault is found in the engine or wheel movement of either vessel after they became aware of each other. Agony of collision was upon them and avoidance was then impossible" (Appendix, p. 5). This finding obviously—and necessarily—referred to the situation from the time the DUKE was first seen by the HAITI VICTORY shortly after 0415 hours, and was apparently so interpreted by the Court of Appeals below.

The decision of the court below, exonerating the HAITI VICTORY in spite of a plain statutory fault contributing to the collision, should accordingly be reviewed and reversed. If it is allowed to stand, different standards of maritime conduct will be applied in the different circuits, and doubt and confusion will have been injected into what has heretofore been a straightforward and simple principle.

CONCLUSION

Each of the several issues presented by the decision below is believed to involve a question of admiralty jurisprudence or procedure which is of such importance that it should be settled by this Court. In addition, the decision on each of these issues collides squarely or at least is on a collision course at close quarters with decisions of other courts of appeals and, with respect to the HAITI VICTORY's violation of Article 16, is in conflict with important principles laid down by this Court as well. It is accordingly urged that a writ of certiorari to review the decree of the court below should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

Admiralty 7622

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

Following the collision of the USNS Haiti Victory with the SS Duke of York in the North Sea, the United States filed here a petition for exoneration from or limitation of liability. British Transport Commission, the owner of the Duke of York, has filed a claim for the collision damage to that vessel. Other claimants, including the personal representatives of passengers killed in the collision, seek to implead, under Admiralty Rule 56, the British Transport Commission as an additional party defendant to their claims against the United States, laying contributive negligence to the Duke of York. The Commission excepts to the impleader.

The impleading petitions cannot be allowed. While the limitation of liability statute, as executed by Admiralty Rules 51-54, has been authoritatively interpreted as offering a forum for the complete adjudication and recovery of all claims, the reference is to claims and remedies against the petitioner only. *Hartford Accident Co.* v. *Sou. Pacific* (1926) 273 U.S. 207; *Just* v. *Chambers* (1941) 312 U.S. 383, 386. No case has permitted the impleading of one co-claimant by another. In The Clio-The Springhill, 1948 A.M.C. 75-77, Judge Knox permitted the original petitioner to implead a third-party defendant, but the latter was a claimant in the concourse, and the impleader was simply a counter or otherwise defensive move of the petitioner in respect to that claim.

To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary en-

trance. *Department of Highway* v. *Jahncke Service* (1949) 5 Cir. 174 F.2d 894 sustains this position. Although the impleaded party was not already in the cause, the same principle there enforced governs here.

Denial of the instant motion will be based upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other.

(S). ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.
July 2nd, 1954.

* * * * * *

Admiralty 7622

[Caption Omitted]

William B. Eley, Administrator of the Estate of Dale M. Chaney, deceased, L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, Joseph D. Baca, Oliver Gorm Clausen, and certain other claimants, having filed motions for leave to file petitions herein under the 56th Rule in Admiralty impleading a co-claimant, British Transport Commission, as owner of the SS DUKE OF YORK, and British Transport Commission having objected thereto on the ground that said claimants have no right to implead the said Commission herein;

And an order having been entered in this Court on May 3, 1954, reserving the objections of the British Transport Commission for hearing and determination, and ordering further that meanwhile, and subject to the further order of this Court, leave be granted to said claimants to file their petitions herein;

And this Court, after hearing the arguments of proctors, having filed a memorandum, dated July 2, 1954, denying the motions upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other;

And Juliet R. Chamberlain having moved this Court to file an amended impleading petition against British Transport Commission, to which said Commission has objected upon the ground that said claimant has no right to implead the said Commission herein;

Now, on motion of McNutt & Nash, Esquires and Baird, White & Lanning, Esquires, proctors for the British Transport Commission, it is

Ordered:

1. That the petitions of William B. Eley, Administrator of the Estate of Dade M. Chaney, deceased, L. T. Seawell, Jr., Administrator of the Estate of Ferdinand Vodicka, deceased, Juliet R. Chamberlain, Joseph D. Baca, Oliver Gorm Clausen and any and all other claimants herein who may have filed petitions to implead British Transport Commission under the 56th Rule in Admiralty pursuant to the order of this Court dated May 3, 1954, or otherwise, be and they are hereby dismissed, to which ruling each of said impleading petitioners excepted as did also the United States.

2. That the motion of Juliet R. Chamberlain to file an amended impleading petition be and it is hereby granted, but the said amended petition is now dismissed, to which ruling the said Juliet R. Chamberlain excepted.

(S.) ALBERT V. BRYAN,
United States District Judge.

Richmond, Va.
May 12th, 1955.

APPENDIX B

Memorandum by the Court.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

Admiralty 7622

IN THE MATTER OF THE PETITION OF THE UNITED STATES OF AMERICA AS OWNER OF THE USNS HAITI VICTORY, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

Just before dawn in the North Sea on May 6, 1953, the USNS HAITI VICTORY, headed for Bremerhaven, and the westbound S.S. DUKE OF YORK, an overnight ferry between the Hook of Holland and Harwich, England, collided. The DUKE OF YORK had just emerged from a fog, the HAITI VICTORY was running in clear weather. Minor damage was suffered by the HAITI VICTORY, but her stem so deeply knifed into the port side of the DUKE OF YORK, just forward of her

bridge, that the entire bow of the latter fell off and sank. Several of her 437 passengers were killed, others injured, and a large number lost their personal baggage. As owner of the HAITI VICTORY, the United States of America has filed a petition for exoneration from or limitation of liability. The question is whether either or both vessels failed to observe the care and caution enjoined upon mariners, by seamanship and statute, for the prevention of collisions at sea.

Asking $1,500,000 for her damage, the British Transport Commission, operating the DUKE OF YORK in connection with the British railway system, has led in the effort of the claimants to lay responsibility for the accident to the HAITI VICTORY. Petitioner's right to limitation, as well as the limitation fund of $1,039,959.52, has been established without contest. Certain claimants sought, through impleading petitions, to assert and try in this proceeding the liability of the British Transport Commission to them; the attempts were rejected and the immunity of the Commission thereto in the present forum was sustained. Ascertainment of the quantum of damages has been deferred in each instance to the determination of liability.

The DUKE OF YORK, a twin-screw steam turbine oil burner, 339 feet in length, left the Hook of Holland bound for Harwich a few minutes after midnight May 5, 1953 (early morning of May 6). She had a maximum speed of 18-20 knots and the crossing was normally a matter of five hours. Her lane was slightly south of due west—W. ¼° S., 267° magnetic—and took her about a mile south of Galloper Lightship, located off the English coast some distance north of the Thames' mouth. The Hook and Harwich are nearly on the same parallel, a little below the 52nd N. The DUKE was showing all required navigation lights—two steaming lights forward, masthead and mainmast, a stern light, and red and green side running lights. Her equipment included radar, but the instrument failed before the ship was twenty minutes out. In addition to her regular officer complement, she carried a Dutch pilot all the way across.

The HAITI VICTORY is a single-screw propeller, of the Victory ship type, 439 feet in length and equipped with radar. She took on a licensed British pilot at Dover just after 0117 British Summer Time, which was one hour ahead of Greenwich Mean Time and is the time of the references herein. Up to Galloper Lightship her course was generally 022° at first, and then 024°, gyro. Passing on her port hand

the South and East Goodwin Lightship enroute, she came abeam of Galloper at about 0414 BST. After an alteration of her course to 050° gyro, to go under the stern of a crossing vessel, when 1½ miles to the east of Galloper, the HAITI VICTORY settled on a firm course of 036° gyro. She was maintaining her maximum speed, 17-18 knots, and was showing all requisite lights.

The HAITI VICTORY's first notice of the DUKE's presence was the latter's fog whistle just after 0414 hours. It was caught by the HAITI VICTORY's forward lookout, and immediately reported to the bridge, as being off the starboard bow. Her pilot had heard it too. Instantly he passed to the starboard door of the wheelhouse, scanned the darkness from bow to beam, saw nothing and went directly to the radar. It disclosed a target on his starboard bow. Going again to the starboard wing of the bridge and again seeing nothing, he at once stopped his engines—0415 hours. Within a moment the red light of the DUKE appeared on his starboard bow but ½ mile off; thereupon the HAITI's rudder was put Hard Right, her engines Full Astern, and her whistle given a short blast. At 0416 the ships were together.

Aboard the DUKE, the captain heard a whistle four or five points on her port bow—the blast of the HAITI as she went Right Rudder and Full Astern. About the same time his forecastle-head lookout shouted his observation of the HAITI's masthead light, as well as her green light, ¼ mile away, about 6 points on the port bow. While taking a "fix" from the Decca dials in the wheelhouse, the DUKE's second mate heard the lookout's call, and running out on the port wing picked out the HAITI's green light with his binoculars, his radar being inoperable. At once the master put the DUKE's engines on Slow, manually sounded a prolonged blast on her whistle, and followed it with Full Astern and 3 short blasts. Collision ensued.

The collision was two miles east of Galloper. The prow of the HAITI VICTORY penetrated the port bow of the DUKE OF YORK on the foreside of her bridge. The HAITI VICTORY puts the time at 0416, the YORK at 0418 hours. No fault is found in the engine or wheel movements of either vessel after they became aware of each other. Agony of collision was upon them and avoidance was then impossible. Existence or absence of earlier fault becomes a question of whether for the weather then prevailing the conduct of either vessel constituted negligence in navigation; there-

fore, the primary and crucial inquiry is what was the weather as known, or as it ought to have been known, to the two navigators.

A meteorological cold front was moving over the North Sea, from northeast to southwest, on the very early morning of the collision, May 6, 1953. It seemed to be pivoting on a point to the north of the east coast of England. By illustration, at midnight, GMT, along the English coast the weather was favorable, and was as favorable along the European coast as far north as the Hook of Holland; from midnight until 4 o'clock A. M. BST it moved southwardly 60 miles along the Dutch coast, but only 20 to 30 miles along the English shore. As a "weak" front it included only drizzle, overcast and fog with very poor visibility. At 4 o'clock BST it was still 60 miles northeast of Galloper, but twice as far down the European coast as on the opposite coast. From 4 o'clock until 7, it was almost stationary on the English side, leaving fair visibility there, but the night was dark. In and around Galloper the weather at 0300 hours was "cloudy with wet dew", meaning on Galloper's log legend that the moon or stars would be visible at times. Fog signals were not commenced by Galloper until 0445 (the collision was at 0416 or 0418) and not until 0600 was it overcast and misty at Galloper. "Misty * * * is not quite as thick as [fog] but enough to cause objects to be indistinct and to require the fog signal to be sounded." The frequency of the fog and the low visibility increased from Galloper toward the Dutch coast.

From the time the DUKE left the gas buoy, the first sea point, off the Hook of Holland, she met fog. As early as 12:45 A. M., less than an hour after leaving the docking pier, her captain was called to the bridge on account of the fog. At Noord Hinder Lightship, off the Dutch coast and 9 miles south of the DUKE's track, the log records, the weather as foggy from one A. M. to five. The DUKE was running through a "patchy" fog—"very thick at times" and then fairly clear intervals. She was piercing one fog bank after another. Fog signals from the vessel's steam whistle were sounded continually. From 3 A. M. on, the fog was "very thick". This is the testimony of the DUKE's crew. The fog pocket she transited immediately before the collision was apparently the westernmost in her course.

In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the "moderate speed"

injunction in the fog rules of Article 16, International Rules, 33 USCA 145n. It was an overriding and major fault; collision was a foreseeable result. Enveloped repeatedly throughout her passage in a fog that severely cut visibility, a fog that rendered her invisible, she nevertheless assumed and kept to her clear weather speed—she reached Galloper at her regularly scheduled hour. When on the bridge at 12:45 A. M., the captain reduced the engines to Half Speed, 12 knots, but within a few minutes he put them back on Full Speed, 18 knots, and returned to his cabin, evidently satisfied with the visibility. Never was visibility greater than 1 or 2 miles. From 0053 until 0325 hours her engines were at Full Speed Ahead. Twenty-four miles east of Galloper, 0325, visibility was shorter than a mile; by 0412, six minutes before the collision, it was less than half a mile; but during this period, save for a minute, her speed was 16 knots, Standby Full Ahead. At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, Half Ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to Slow, 6 knots.

Obviously, too, the DUKE was not conforming to the authoritative interpretation of Article 16—that speed in a fog shall not exceed a rate that would allow her, with the assistance of her engines, to come to a standstill before she would collide with another vessel that she should see. The Lawrence, 1893, 4 cir. 54 F. 542-544; The Silver Palm, 1937, 9 cir. 94 F. 2d 754, 757; Griffin on Collision, p. 292 et seq.; The Fjell, 1919 E.D. Va. 257 F. 478,480, opinion by Judge Waddill. Indeed, she could not stop in time to allow the bow watch to get below to warn his companions. That 12 knots in a fog of ¼ mile visibility is in fact an immoderate speed seems manifest; that it is so in law is well precedented. Griffin on Collision, p. 301, footnote 1.

As to fault in the HAITI VICTORY, decision depends on whether she knew or ought to have known that she was running into or alongside a fog bank. If she had such knowledge, actual or attributable, and if the fog rules bind a vessel approaching or running alongside a fog, she was at fault; for she was proceeding at full speed, 17-18 knots, and was taking no fog precautions. But the Court finds that she was neither in a fog nor chargeable with notice of the nearby fog patch. It cannot be successfully argued

that, with the DUKE so near, the HAITI VICTORY must necessarily have been aware of the fog enshrouding the DUKE. The evidence denies any such deduction. The fog cloaking the DUKE hid her as effectively as it hindered her; and all the while remained imperceptible to the outsider.

As the HAITI left Dover, visibility was excellent, so clear that the radar was soon switched off. Lights were distinct on both sides of the Channel, ahead and astern. One vessel was overtaken on the way, readily discernible. At 0400, Galloper was easily picked up one point on the port bow. Just before the HAITI came abeam of Galloper, still another vessel was seen, running from Goeree Lightship on the Holland coast and a little south of the Hook, to Harwich. The HAITI VICTORY altered her course to 050° to give way to the crossing vessel, went around her stern, and resumed her plotted course on 036°. The crossing vessel, as indicated, came from the east, the very direction from which the DUKE was coming. She was plainly seen when as much as 4 or 5 miles eastward. This was at 0414 hours—2 minutes before the collision. A trawler a mile and a half north of the Duke, and on a parallel course showed no consciousness of any fog. As we have seen, even Galloper did not find it advisable to issue fog signals until 0445; and then it did so not for fog, only for "Cloudy Wet dew." Signs of fog were not seen by the HAITI VICTORY until after the DUKE revealed herself. They were not overlooked; they were not there.

To charge the HAITI VICTORY with knowledge of the proximity of fog, the DUKE called to the stand the mate of the S.S. American, a ship following the HAITI VICTORY up the North Sea. Her course was 034° True. Departing Dover seventeen minutes after the HAITI VICTORY, the mate said he was able at 0425 to see, 8½ miles on his "port head", the Kentish Knock Light located on the English coast; he stated the visibility was 10 miles. His log contains no entry of bad weather between 0236 and 0441. His notation of fog at 0441 corresponds to Galloper's log of fog signals at 0445; but American's record reveals that fog was only setting in at 0441, that not until then were her engines put on Standby, and only at 0450 was her speed reduced because of fog. He states he could not see Galloper until within ½ mile of it at 0506; but his log notes that the American came abeam of Galloper at 0508 with 3 miles visibility. Hence, he gives no proof of fog perception on the English coast as early

as 0416 or 0418—collision times. When 1½ miles passed Galloper, 0512, he saw the DUKE and the HAITI lying alongside each other fore and aft.

True, the HAITI VICTORY's master did not completely undress on turning in, staying ready for any call, including a fog alarm. He testified, too, of the frequency of fogs in the North Sea. But, all of this discloses precaution against fog, not suspicion of it. Of course, he knew that ships traversed the North Sea between the English and Dutch ports; but he had the right to assume that their presence would be announced through the signals, and would be accompanied by the seamanship, demanded by the laws of the sea. Admittedly, as to the westbound traffic he was the burdened vessel, they the privileged; but again their paramount rights presuppose their observance of the law. Failing in this, their priority is forfeited. Specifically, compliance with the fog rule was a prerequisite to assertion of the righthand vessel's crossing privileges.

Strenuous insistence of fault in the HAITI VICTORY is urged for her failure to make use of radar, particularly when the HAITI VICTORY's mate had glanced into the radar at Galloper. The assertion is plausible but actually unsubstantial. After the Goeree-Harwich vessel had crossed and passed down the port side of the HAITI VICTORY, the second mate turned on the radar. His purpose was to get his distance off Galloper. It was turned on just as the HAITI VICTORY was changing back from her passing course of 050° to the new course of 036°. He did not see the DUKE on the PPI (planned position indicator) repeater scope, though probably there was a pip on the right half of the scope. But he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the DUKE was not negligence, for it was not the result of neglect of an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it.

At this point it is well to refer to the DUKE's radar. Its use would have avoided the collision and its unavailableness was due to neglect of repair. There was ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the DUKE OF YORK's excessive speed was the predominant fault leading to the collision, it is not necessary in this

case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence.

This memorandum is adopted by the Court as its findings of fact and conclusions of law. Within 10 days proctors for the United States will present a decree in accordance therewith, exonerating the petitioner, after submitting copies to the claimants' proctors for consideration as to form.

(Sgd.) ALBERT V. BRYAN,
United States District Judge.

Alexandria, Virginia.
May 5th, 1955.

FINAL DECREE OF EXONERATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA AT NORFOLK

Admiralty 7022

In the Matter of the Petition of the United States of America, as Owner of the USNS HAITI VICTORY, for Exoneration from or Limitation of Liability

The petition of the United States of America as owner of the USNS HAITI VICTORY for exoneration from and limitation of liability having come on for trial on the pleadings and proofs of the petitioner and of the said claimants and having been argued by the advocates of the respective parties;

And the Court having filed its decision that the collision and the loss, destruction, damage and injury arising therefrom were not caused by or contributed to by the fault or neglect of the petitioner or those in charge of the USNS HAITI VICTORY, and that the petitioner was entitled to exoneration from liability, as appears by the opinion on file;

Now, on motion of L. S. Parsons, Jr., United States Attorney, proctor for the petitioner, it is

ORDERED, ADJUDGED AND DECREED,

That the collision described in the libel and petition was not caused by or contributed to by the fault or neglect of the petitioner or those in charge of the USNS HAITI VICTORY;

And that said petitioner is entitled to exoneration from liability;

And that said petitioner be and hereby is forever exempted and discharged from all loss, damage, destruction or injury arising from or growing out of the said collision.

ALBERT V. BRYAN,
U. S. District Judge.

Alexandria, Virginia,

June 2, 1955

No objection as to form

Edwin Longcope,
Baird, White & Lanning,
Hughes, Little & Seawell,
Jett, Sykes and Howell,
Vandeventer, Black & Meredith,
John W. Oast, Jr.,
David H. Batchelder, Jr.,
Earl M. White,
C. Lydon Harrell,
Roger Brooks,
John P. Parrish.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7102

BRITISH TRANSPORT COMMISSION, ET AL., APPELLANTS,

versus

UNITED STATES OF AMERICA, as owner of the USNS HAITI VICTORY, petitioning for exoneration from or limitation of liability in a cause of limitation of liability, civil and maritime, APPELLEE.

Appeals From the United States District Court for the Eastern District of Virginia, at Norfolk.

In Admiralty.

(Argued January 7, 1956. Decided February 13, 1956.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Edwin Longcope (Baird, White & Lanning; McNutt & Nash, and Edward R. Baird on brief) for Appellant, British Transport Commission; Wilbur E. Dow, Jr., (John W. Oast, Jr., David H. Batchelder, Jr.; Dow & Symmers; Vandeventer, Black & Meredith; Hughes, Little & Seawell; Jett, Sykes & Howell; C. Lydon Harrell, Jr., and Earl W. White on brief) for Appellants, Intervening Claimants; and Thomas F. McGovern, Attorney, Department of Justice, (L. S. Parsons, Jr., U. S. Attorney; Leavenworth Colby, Attorney, Department of Justice, and John M. Hollis, Assistant U. S. Attorney, on brief) for Appellee.

DOBIE, Circuit Judge:

On May 6, 1953, in the very early morning, a collision occurred in the North Sea between the overnight ferry DUKE OF YORK (hereinafter called the DUKE) owned by the British Transport Commission (hereinafter called the Commission), and the transport HAITI VICTORY (hereinafter called the HAITI), owned by the United States. Terrific damage was done to the DUKE, several persons on the DUKE were killed, others were injured and many suffered prop-

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MATTHEW BENDER & COMPANY

erty damage. The HAITI suffered only minor damages to her bow, amounting to some $60,040.48.

A petition was filed in the United States District Court for the Eastern District of Virginia by the United States, as owner of the HAITI, seeking exoneration from and/or limitation of liability for all losses and damages resulting from the collision. The Commission filed in these proceedings a claim of $1,500,000 for the losses and damages sustained by the DUKE. Numerous death, personal injury and baggage claimants also filed claims in the limitation proceedings, in varying amounts.

Some of the other claimants also filed petitions in the limitation proceedings, seeking to implead the Commission therein under General Admiralty Rule 56. In an unreported memorandum, the District Court held that the other claimants could not implead the Commission, for the reason that a limitation proceeding does not provide a forum for the adjudication of the liability of co-claimants to each other. Accordingly, an order was entered in the District Court dismissing the impleading petitions of these other claimants.

The limitation proceedings were tried in the District Court before Judge Albert V. Bryan. At the trial the right of petitioner, United States, to limit its liability, as well as the limitation fund of $1,039,959.52, was established without contest.

Thereafter, Judge Bryan filed his opinion, (131 F. Supp. 712) in which he held that the DUKE was solely to blame for the collision. The final decree exonerating the HAITI was filed in accordance with this opinion.

The Commission, and the other claimants, have filed appeals from the final decree exonerating the HAITI. The other claimants have also appealed from the order dismissing their petitions to implead the Commission in the government's limitation proceedings.

Two questions are before us on this appeal: (1) Did the District Court commit error in exonerating the HAITI and holding the DUKE solely to blame for the collision; and (2) Did the District Court commit error in dismissing the petitions of the other claimants to implead the Commission in the limitation proceedings instituted by the United States seeking exoneration from, and/or limitation of liability for, losses and damages resulting from the collision.

The fault of the DUKE seems quite clear and is not seriously contested. She had left the Hook of Holland boun-

West for Harwich, England. We quote from the opinion of the District Judge, which finds ample support in the record, (131 F. Supp. 712, 715):

> "The DUKE was running through a 'patchy fog'—'very thick at times' and then fairly clear intervals. She was piercing one fog bank after another. * * * From 3 A. M. on, the fog was 'very thick.' * * * In such weather the speed of the DUKE OF YORK was too fast for good seamanship; it violated the 'moderate speed' injunction in the fog rules of Article 16, International Rules, 33 USCA § 145n. It was an overriding and major fault; collision was a foreseeable result. * * * At 0412 and up to the collision, visibility was ¼ mile, the captain, his mate and lookout have said, and even in this interval the speed was 12 knots, Half Ahead. Not until the HAITI VICTORY was sighted, the ships ¼ mile apart, and the collision a minute or two off, did the engines go to Slow, 6 knots."

Had the weather been clear and the visibility good all around; under the Starboard Hand Rule, the DUKE would have been the privileged, the HAITI the burdened, vessel. This rule, though, did not apply here by virtue of the fog surrounding the DUKE.

This brings us to the District Court's exoneration of the HAITI, a discussion involving at least three points: (a) Actual or constructive knowledge on the part of the HAITI that she was running into, or alongside, a fog bank; (2) The conduct of the HAITI after the HAITI heard the whistle of the DUKE; (3) The negligent use, or failure to use its radar by the HAITI. A careful study of the record convinces us that we cannot reverse the District Court's exoneration of the HAITI.

Visibility was excellent as the HAITI, with a Trinity House pilot, left Dover, bound for Bremerhaven, Germany. Lights were distinct on both sides of the English Channel. Around 0400 Galloper Lightship was easily picked up by the HAITI, about one point on the port bow. A very short while before the HAITI came abeam of Galloper, a crossing vessel was seen by the HAITI, about 4 miles away. The HAITI altered her course to 050°, went around this vessel's stern and then resumed her plotted course of 036°. This happened about 0414, approximately 3 minutes before the collision, and this crossing vessel came from the East, the direction from which the Duke was coming.

A trawler, about 1½ miles North of the DUKE, and on a course practically parallel to the DUKE, gave nothing to indicate the presence of fog. Galloper gave no fog signals until 0445, and then signalled only "Cloudy wet dew." The collision occurred about two miles East of Galloper. The mate of the S. S. AMERICAN, which left Dover 17 minutes after the HAITI, testified that his log contained no notation of fog until 0444.

Confirmatory testimony to the effect that there was no fog and no signs of impaired visibility apparent to those on the HAITI was given by her bow lookout, her helmsman and her mate. We must, therefore, affirm the holding of the District Court that the HAITI never knew, nor should have known, of the fog which enveloped the DUKE.

This brings us to the conduct of the HAITI just prior to the collision. The first notice those on the HAITI had of the presence of the DUKE was a single blast whistle from the DUKE. The bow lookout of the HAITI promptly reported to the bridge by telephone that he had heard what he thought was a ship's whistle off the HAITI's starboard bow. This whistle was also heard by the helmsman and pilot of the HAITI. The time, then, was apparently about 0414.

The pilot dashed out on the starboard side of the wheelhouse, looked around, saw nothing and went to the radar which disclosed an echo off the starboard bow. He again went out, saw nothing and stopped the engines, around 0415. Those on the HAITI thought the single blast they heard was a fog signal, but they were not sure of this.

Apparently in about a minute, the HAITI pilot saw the DUKE crossing from starboard to port, gave the order hard right, blew one short blast and went full speed astern. The full speed astern was logged on the HAITI at 0415-½, the collision at 0416. The HAITI changed course from 036° to 079° before striking the DUKE. The pilot of the HAITI testified that when he first saw the DUKE looming out of the fog, there was nothing that could be done by the HAITI beyond the hard right and full speed astern. A survey of the deformation of the plates, which is the resultant of the velocities of the ships, showed the speed of the DUKE, at the moment of impact, to be from 2 to 4 times the speed of the HAITI.

Under these facts, we must affirm the holding of the District Court exonerating the HAITI from blame in its con-

duct just before the collision. This includes the contention of the DUKE that the HAITI violated Rule 16 (33 USCA §92):

> "* * *
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

See, THE UMBRIA, 166 U. S. 404; *Johnston-Warren Lines* v. *United States*, 196 F. (2d) 689; *Steffens* v. *United States*, 32 F. (2d) 206; THE ANNA M. FAHY, 153 Fed. 866.

This brings us to the radar question. Since the visibility was good, the radar on the HAITI was switched off to stand by about two hours after the pilot boarded the HAITI. At stand by, no images are visible on the radar screen, but the radar is kept heated and, as the pilot testified, "When you do switch it, it comes on immediately." It was proved that the delicate cavity magnetron of the HAITI radar has a short life, so that the actual use of the radar must be carefully rationed.

Counsel for the DUKE make much of the failure of those on the HAITI to observe the DUKE when, for purely navigational purposes, the radar was switched on as the HAITI neared Galloper and the HAITI mate failed to find the DUKE on the radar screen. On this point, we quote from the opinion of the District Judge, (131 F. Supp. 712, 717):

> "Strenuous insistence of fault in the Haiti Victory is urged for her failure to make use of radar, particularly, when the Haiti Victory's mate had glanced into the radar at Galloper. The assertion is plausible but actually unsubstantial. After the Goeree-Harwich vessel had crossed and passed down the port side of the Haiti Victory, the second mate turned on the radar. His purpose was to get his distance off Galloper. It was turned on just as the Haiti Victory was changing back from her passing course of 050° to the new course of 036°. He did not see the Duke on the PPI (planned position indicator) repeater scope, though probably there was a pip on the right half of the scope. But he was not looking for anything to starboard; he had no reason to go to the radar to search in any direction. His failure to see the Duke was not negligence, for it

was not the result of neglect of an obligation. No obscurity obligated him to use his radar, and there was nothing else to put him on notice of any need for it."

With this, we must concur. See, THE SOUTHPORT, 82 Ll. L. Rep. 862; *United States* v. THE AUSTRALIA STAR, 172 F. (2d) 472, 476, cert. denied 338 U. S. 823; *Wood* v. *United States*, 125 F. Supp. 42, 51; *Pocahontas Steamship Co.* v. THE ESSO ARUBA, 94 F. Supp. 486, aff'd. 197 F. (2d) 422; *Anglo-Saxon Petroleum Co.* v. *United States*, 88 F. Supp. 158; Wylie, Use of Radar at Sea (Institute of Navigation, London, 1953).

As to the defective radar on the DUKE, the District Judge observed, (131 F. Supp. 712, 717):

"At this point it is well to refer to the Duke's radar. Its use would have avoided the collision and its unavailableness was due to neglect of repair. There was ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the Duke of York's excessive speed was the predominant fault leading to the collision, it is not necessary in this case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence."

This brings us to the second question before us on this appeal: Did the District Court err in denying the petitions of various claimants to implead the co-claimant, British Transport Commission. This right of impleader is sought under the 56th. Admiralty Rule:

"In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that

such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against: the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

The District Judge stated:

"The impleading petitions cannot be allowed. While the limitation of liability statute, as executed by Admiralty Rules 51-54, has been authoritatively interpreted as offering a forum for the complete adjudication and recovery of all claims, the reference is to claims and remedies against the petitioner only. * * *

To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary entrance."

In his opinion, the District Judge cited, with the admission that none of these cases was precisely in point, *Just* v. *Chambers*, 312 U. S. 383, 386; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207; *Department of High-*

ways v. *Jahncke Service, Inc.*, 174 F. (2d) 894; THE CLIO THE SPRINGHILL, 1948 A. M. C. 75.

This appears to be a question of first impression. While there have been cases involving the right of a petitioner in a limitation of liability proceeding to implead a claimant therein and the right of a claimant or a petitioner to bring in a third party, there have been no cases that involve the precise issue here involved: Whether one co-claimant in a limitation of liability proceeding can implead another co-claimant under the provisions of the 56th. Admiralty Rule.

We advert briefly to the cases cited in the District Judge's opinion. In The Hartford Accident and Just cases, *supra*, the Supreme Court held that when the jurisdiction of the court of admiralty has attached through a petition for limitation, the jurisdiction to determine liability is not lost merely because the shipowner fails to establish his right of limitation, and the claimants will be furnished a complete remedy by distribution of the *res* and by judgments *in personam* for deficiencies against the owner. In the Department of Highways case, *supra*; the impleading petition was denied, but, in that case, it was a third party that was sought to be impleaded rather than a co-claimant which was before the court and thus subject to the court's jurisdiction, as is the Commission in the instant case. In the CLIO SPRINGHILL case, *supra*, the impleading petition was granted, but the party seeking the impleading petition was the petitioner in the limitation of liability proceeding.

Though the question is close and not free from difficulty, we think the District Court erred in denying these impleading petitions, which should have been granted. While a hardship might thereby be suffered by the Commission, it would be an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings. Here we have many claimants from many parts of the world, who have filed their claims in the limitation proceedings instituted by the United States. All of the evidence concerning the collision involved herein has been presented both by petitioner and the claimant, British Transport Commission. The merits of the case have been adjudicated and it would work an undue hardship on all of the claimants herein not to have their rights against the British Transport Commission settled at this time. To hold otherwise would mean that the various claimants would have to pursue their causes of action against the Commission in

another forum at great expense and at a time when perhaps much of the evidence necessary to support their claims would have been lost due to the lapse of time.

As a practical matter as well as an equitable one, the claimants herein should be allowed to implead the Commission. The Court (United States Court of Appeals, Second Circuit) in *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corporation*, 86 F. (2d) 708, stated that a determination in a limitation of liability proceeding will be *res adjudicata*. This position is also supported by THE ADAH, 258 Fed. 377, wherein the same court stated that all parties to a proceeding for limitation of liability who appear voluntarily or otherwise and join issues with the petitioners and between themselves are bound by the decree. Thus, if the issue of liability in the instant case is *res adjudicata* and all the parties herein bound thereby, then the District Court should also decide the issue of damages as between all the parties before it and this could only be accomplished by the allowance of an impleading petition under the 56th Admiralty Rule.

It has often been said that admiralty courts sit as courts of equity. Certainly wide acclaim has been lavished on the delight of equity in doing complete justice to all the parties before it and here the Commission was before the court. This view was admirably stated by Chief Justice Taft in the Hartford Accident case, 273 U. S. 207, 215-216:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the case with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. * * * The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many-cornered controversy."

This equitable principle was stated and applied by the Supreme Court in the case of *Alexander* v. *Hillman*, 296 U. S. 222, which was an equity suit brought by receivers of a corporation for the purpose of winding up the affairs of

the company and the disposition of its assets. Certain officers of the corporation, who were not served with process, appeared as respondents and presented their claims. The receiver of the company then filed various counterclaims against the officer-respondents and prayed for affirmative relief against them. This affirmative relief was allowed. Said Mr. Justice Butler, 296 U. S. 222, 239, 241-242:

> "Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them.
>
> * * *
>
> Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief."

The directors were required, at the risk of forfeiting their rights, to comply with the invitation and order of court, and present their claims in the receivership proceeding. See, also, the opinion of Circuit Judge Parker, (citing *Alexander* v. *Hillman*) speaking for our Court in *Florance* v. *Kresge*, 93 F. (2d) 786.

It is contended by counsel for the DUKE that limitation proceedings in admiralty are distinctive and statutory, that they are *sui generis* and quite unlike suits in equity or ordinary civil actions in admiralty. It is said they are neither proceedings *in rem* nor *in personam*. Accordingly, we are told, admiralty courts in such unique and peculiar proceedings should not apply the usual doctrines of equity or admiralty. This technical contention leaves us rather cold. It does not wean us from the liberal view we have reached.

Modern codes of procedure have reflected two facets: (1) all rights, if this can fairly be done, should be decided in a

single legal proceeding; (2) parties who submit themselves to the jurisdiction of a court in a legal proceeding should be bound by that court's decision on all questions, appropriate to and seasonably raised in, that proceeding. Those ideas, we think, can reasonably be deduced from the spirit, if not the letter, of the 56th Admiralty Rule. Certainly that spirit finds support in the Federal Rules of Civil Procedure.

The decree of the District Court, in so far as it exonerates the HAITI and holds the DUKE solely responsible for the collision, is affirmed. That part of the decree which denies the impleading of the Commission by the other claimants in the limitation proceeding is reversed. And the case is remanded to the District Court for further proceedings in conformity with the opinion.

Affirmed in part; Reversed in part and Remanded.

DECREE.

Filed and Entered February 13, 1956.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7102

BRITISH TRANSPORT COMMISSION AND CARL LUDWIG ABENDROTH, EMANUEL PHILIP ANHOLT, MATTHEW WILLIAM BAILEY, WILLIAM H. BAKER, M. J. BALL, WILLIAM H. BARKER, DONALD STANLEY, JOHN BELLAMY, RAF, CAHN & BENDIT, LTD., ALISTAIR A. CAMERON, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, as owner of the USNS HAITI VICTORY, petitioning for exoneration from or limitation of liability in a cause of limitation of liability, civil and maritime, APPELLEE

APPEALS FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court entered June 2, 1955, appealed from in this cause be, and the same is hereby, affirmed; that the order of the said District Court entered May 12, 1955, appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings in conformity with the opinion of the court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
United States Circuit Judge.
ARMISTEAD M. DOBIE,
United States Circuit Judge.

(9795-6)